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

REPLY TO THE ATTENTION OF:
C-14J

May 17, 2012

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
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 the following, filed on May 17, 2012, in the above-captioned matter:

- Complainant's Response to Respondents' Motion *in Limine* to Bar Certain Testimony and/or Opinions of Michael Beedle
- Complainant's Response to Respondents' Motion *in Limine* to Bar Evidence of the Financial Worth or Assets of Scott Forster and Eric Lofquist (*both redacted and non-redacted copies filed)
- Complainant's Response to Respondents' Motion *in Limine* to Preclude U.S. EPA's Evidence of Prior History
- Complainant's Response to Respondents' Motion *in Limine* to Preclude Evidence or Testimony Relating to the "Prior History" of Scott Forster
- Complainant's Response to Respondents' Omnibus Motion *in Limine* on "Routine" Matters

EPA is aware that there has not yet been a decision regarding Complainant's Motion for Leave to File Out of Time (originally styled "Complainant's Motion to Extend Response Deadline for Its Responses to Respondents' Motions *in Limine*"). However, in the event

this motion is granted, Complainant wants the above responses to be immediately available to the Court.

Sincerely yours,

Catherine Garypie
Associate Regional Counsel

Enclosures

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	**Docket No. RCRA-05-2011-0009**
	)	
Carbon Injection Systems, LLC,	)	
Scott Forster,	)	
Eric Lofquist,	)	
	)	
Respondents.	)	
	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION *IN LIMINE* TO BAR CERTAIN TESTIMONY AND/OR OPINIONS OF MICHAEL BEEDLE

Complainant, the United States Environmental Protection Agency, Region 5, pursuant to Rule 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules or Rules), hereby responds to "Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's Motion *In Limine* to Bar Certain Testimony and/or Opinions of U.S. EPA's Fact Witness Michael Beedle" (Motion). 40 C.F.R. § 22.16.

I. Standard for Motions *in Limine*

Motions *in limine* are not referenced in the Consolidated Rules. However, the Rules provide that "the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). Where there are no administrative rules on a subject, it is appropriate to consult federal court practice, Federal Rules of Civil Procedure, or the Federal Rules of Evidence as guidance in analogous situations. *See In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 1997 EPA App. LEXIS 27, *29-30, (Sep. 30, 1997) (holding that when the Part 22 rules are not explicit on a particular procedural issue, the Board is authorized to interpret the rules and determining what practice to follow,

noting that the Board has "often looked to decisions of the federal courts on issues of procedure", and applying a line of federal court cases to an affirmative defense issue). In federal court practice, 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). Administrative courts have noted that "[u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2012 EPA ALJ LEXIS 11, *9 (Feb. 1, 2012) (citations omitted). Accordingly, motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). *See also In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, **22-23 (June 2, 2011) and *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9, *6-7 (June 2, 2011).

II. Discussion

In their Motion, Respondents urge that one of U.S. EPA's witnesses, Michael Beedle, should be barred from presenting the following testimony and/or opinions: "1) any testimony of [sic] 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 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 fact or expert witness." Motion at 1-2. The bases for Respondents' complaints appear to be that, because Beedle is a "fact" witness, he cannot give "opinions" or agree with the testimony offered

by experts and that, because U.S. EPA did not identify Beedle as an expert, he cannot provide opinion testimony. Simply, these bases are baseless.

As explained in the "Practice Manual" of the U.S. EPA Office of Administrative Law Judges dated July 2011, "[w]itnesses who testify as to calculation of the penalty are akin to expert witnesses, and the prehearing exchange should include the resume or curriculum vitae for such witnesses. [footnote omitted]." Practice Manual at 20. It has long been the law that "expert" witnesses can provide "opinion" testimony. The Practice Manual states that penalty witnesses are like expert witnesses; Mr. Beedle has been identified as one of U.S. EPA's witnesses providing testimony regarding the calculation of the penalty proposed in this matter; accordingly, Mr. Beedle may properly offer opinions on all of the topics that Respondents object to with respect to the calculation of the proposed penalty. Further, consistent with the instruction in the Practice Manual, U.S. EPA provided Mr. Beedle's resume as part of its prehearing exchanges. See, CX-91. Thus, U.S. EPA has for all intents and purposes, complied with the underlying requirement for identifying a witness as an "expert" that may provide expert testimony.

Allowing a witness to provide opinions where that witness is testifying for U.S. EPA with respect to the proposed penalty calculation is well established in this Court. *In the Matter of: Strong Steel Products, LLC*, Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020, & MM-5-2001-0006, 2003 EPA ALJ LEXIS 191 (October 27, 2003). In *Strong Steel* the respondent moved to bar Mr. Beedle from, among other things, providing opinion testimony with respect to U.S. EPA's proposed penalty amount. *Strong Steel*, 2003 EPA ALJ LEXIS 191 at pp. 16-19. This Court expressly concluded that U.S. EPA's penalty witnesses are akin to experts and, thus, able to provide opinions. Id. at p. 18, 19. As explained by the Presiding Officer "[a]t the

hearing, or in its post-hearing brief, Respondent may raise an objection with regard to any facts (or lack thereof) upon which the original calculation or recalculation was based, the calculation or recalculation itself, or Mr. Beedle's opinions thereon." Id. at 19. In *In the Matter of: Housing Authority of the City of Moundsville, et al.*, Docket No. CAA-03-2003-2001, 2004 EPA ALJ LEXIS 116 (June 7, 2004) is also instructive. In *Moundsville*, U.S. EPA moved to bar certain testimony of to one of respondents on the ground that he had not been identified as an "expert witness" and that his proposed testimony improperly included "opinions." In denying U.S. EPA's motion *in limine* as premature, the Presiding Officer explained that

> The rules of evidence governing proceedings in federal court have specific rules governing the admissibility of both lay and expert testimony. Lay testimony must be based on personal knowledge or observation, according to Rule 602 of the Federal Rules of Evidence. Rule 701 requires that any opinion testimony of lay witnesses must be limited to opinions or inferences which are rationally based on the perception of the witness. Lay witnesses may "offer an [*5] opinion on the basis of relevant historical or narrative facts that the witness has perceived." *MCI Telecomm. Corp. v. Wanzer, 897 F.2d 703, 706 (4th Cir. 1990).* Under Rule 702, an expert who is qualified by knowledge, skill, experience, training or education may provide testimony, which may be in the form of an opinion, of scientific, technical, or other specialized knowledge. An expert witness may not only provide an opinion or inference from facts or data perceived, but also from those "made known to the expert at or before the hearing." Fed. R. Evid. 703.

Moundsville, 2004 EPA ALJ LEXIS 116 at pp.2-3. Thus, even if Mr. Beedle is considered only a "fact" witness (which by this Court's prior treatment he is not), then he would still be able to provide opinions or inferences which are rationally based on his perceptions.

Respondents' claim that Mr. Beedle should be barred from stating agreement with the testimony of other, expert, witnesses (specifically Ms. Coad, EPA's financial expert), should be rejected. First, Respondents base this part of their argument on the fact the while experts might be allowed to state agreement with each other's opinions, Mr. Beedle is not an expert. As

discussed above, EPA's penalty witnesses are deemed tantamount to expert. Accordingly, this basis of Respondents' claim should be rejected. Second, Mr. Beedle was principally responsible for calculating the proposed penalty in this matter. In calculating the proposed penalty, Mr. Beedle relied on work performed by Ms. Coad. Barring Mr. Beedle from stating that he agrees with Ms. Coad's analysis is ridiculous, given that his adoption of her calculations must indicate agreement. Mr. Beedle should be free to explain his rational for adopting her calculations, including stating his agreement with her conclusions.

III. Conclusion

For the foregoing reasons, allowing Mr. Beedle to offer opinions and explaining the bases and rational for U.S. EPA's proposed penalty in this matter is proper, and Respondents' Motion *in limine* is this regard should be denied.

Respectfully Submitted,

Counsel for EPA:

5/17/12
Date

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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 Response to Respondents' Motion in Limine to Bar Certain Testimony and/or Opinions of Michael Beedle," dated May 17, 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 overnight mail to:

Attorneys for Respondents:

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Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge
U.S. EPA Office of the Hearing Clerk
1099 14th St. NW
Suite 350, Franklin Court
Washington, DC 20005

5/17/12
Date

Charles Rodriguez, Student Aide

CONTAINS CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	**Docket No. RCRA-05-2011-0009**
	)	
Carbon Injection Systems, LLC,	)	
Scott Forster,	)	
Eric Lofquist,	)	
	)	
Respondents.	)	
	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION *IN LIMINE* TO BAR EVIDENCE OF THE FINANCIAL WORTH OR ASSETS OF SCOTT FORSTER AND ERIC LOFQUIST

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant), by and through its counsel, pursuant to Rule 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules or Rules), hereby files Complainant's Response to Respondents' Motion *in Limine* to Bar Evidence of the Financial Worth or Assets of Scott Forster and Eric Lofquist. 40 C.F.R. § 22.16.

I. Standard for Motions *in Limine*

Motions *in limine* are not referenced in the Consolidated Rules. However, the Rules provide that "the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). Where there are no administrative rules on a subject, it is appropriate to consult federal court practice, Federal Rules of Civil Procedure, or the Federal Rules of Evidence as guidance in analogous situations. *See In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 1997 EPA App. LEXIS 27, *29-30, (Sep. 30, 1997) (holding that when the Part 22 rules are not explicit on a particular procedural issue, the Board is authorized to interpret the rules and determining what practice to follow,

noting that the Board has "often looked to decisions of the federal courts on issues of procedure", and applying a line of federal court cases to an affirmative defense issue). In federal court practice, 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). Administrative courts have noted that "[u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2012 EPA ALJ LEXIS 11, *9 (Feb. 1, 2012) (citations omitted). Accordingly, motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). *See also In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, **22-23 (June 2, 2011) and *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9, *6-7 (June 2, 2011).

II. Discussion

A. Evidence Containing Information *Only* About the Financial Worth or Assets of Respondents Forster and Lofquist Should Be Barred

In Respondents' Motion *in Limine* to Bar Evidence of the Financial Worth or Assets of Scott Forster and Eric Lofquist, Respondents seek to have evidence containing information about the financial worth or assets of Respondents Forster and Lofquist barred from being introduced as evidence at the hearing in this matter. Complainant has also filed a Motion *In Limine* to Preclude Certain Testimony, Evidence, and Documents ("Complainant's Motion"), which, among other things, requests that this Court bar introduction of evidence regarding the ability of Respondents Forster and Lofquist to pay the proposed penalty. The Respondents agree with Complainant's Motion, stating that "Respondents do not oppose exclusion of evidence regarding

Scott Forster's and Eric Lofquist's individual ability to pay the proposed penalty". Respondents' Opposition to Complainant's Motion *in Limine* at 4. Thus, the parties are in agreement that evidence containing information *only* about the financial worth or assets of Respondents Forster and Lofquist which is relevant *only* for purposes of proving their ability to pay should be barred from introduction at hearing.

B. Evidence Containing Information Relevant to *Both* the Ability of Respondents Forster and Lofquist to Pay the Proposed Penalty *and* Other Issues Before This Court Should Not Be Barred

As stated above, Complainant agrees that evidence containing information *only* about the financial worth or assets of Respondents Forster and Lofquist which is relevant *only* for purposes of proving their ability to pay should be barred from introduction at hearing. However, evidence containing information relevant to *both* the ability of Respondents Forster and Lofquist to pay the proposed penalty *and* other issues before this court should not be barred.

Respondents do not identify exactly which exhibits or what testimony they are seeking to have barred, so Complainant can only guess at what Respondents consider to be "evidence of the financial worth or assets" of Respondents Forster and Lofquist. However, Complainant is aware that some evidence which Complainant expects to introduce at hearing contains information relevant to *both* the ability of Respondents Forster and Lofquist to pay the proposed penalty *and* other issues before this court. The introduction of this evidence should not be barred. One example is CX71.

CX71 primarily contains information regarding the ability of Respondents Forster and Lofquist to individually pay the proposed penalty. However, CX71 also contains information regarding the operational status of Respondent Carbon Injection System LLC ("CIS") and [redacted]

[redacted]. CX71 at EPA17471 and EPA17493-17884. The operations of Respondent CIS are clearly relevant to this case as all counts in the Complaint relate to the operation by Respondent CIS of the facility at Gate#4 Blast Furnace Main Avenue, Warren Township, Ohio. [redacted]. While Respondent has the burden of proof on this issue, Complaint expects to present evidence regarding the finances of CIS at hearing. See *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110), 2011 EPA ALJ LEXIS 24 at **16-161 (December 22, 2011) (holding that a respondent's ability to pay is not a factor that a complainant must consider as part of its prima facie burden of establishing the appropriateness of its proposed penalty, but rather must be raised and substantiated as an "affirmative defense" by the respondent, who bears the burdens of presentation and persuasion for any affirmative defenses under 40 C.F.R. § 22.24(a)). In particular, Complainant expects to present evidence to explain how the assets of CIS arrived at their current state, which will include discussion of [redacted]. Information in CX71 is absolutely relevant, material, and has probative value as to issues in this case *other than* the ability of Respondents Forster and Lofquist to pay the proposed penalty. Therefore, CX71 and other evidence containing information relevant to *both* the ability of Respondents Forster and Lofquist to pay the proposed penalty *and* other issues before this court should not be barred.

III. Conclusion

For the foregoing reasons, evidence containing information relevant to both the ability of Respondents Forster and Lofquist to pay the proposed penalty and other issues before this court should not be barred.

Respectfully Submitted,

Counsel for EPA:

5/17/12
Date

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CONTAINS CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER

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 Response to Respondents' Motion *in Limine* to Bar Evidence of the Financial Worth or Assets of Scott Forster and Eric Lofquist", dated May 17, 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 overnight mail to:

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Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge
U.S. EPA Office of the Hearing Clerk
1099 14th St. NW
Suite 350, Franklin Court
Washington, DC 20005

5/17/12
Date

Charles Rodriguez, Student Aide

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	**Docket No. RCRA-05-2011-0009**
	)	
Carbon Injection Systems, LLC,	)	
Scott Forster,	)	
Eric Lofquist,	)	
	)	
Respondents.	)	
	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION *IN LIMINE* TO PRECUDE U.S. EPA'S EVIDENCE OF "PRIOR HISTORY"

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant), by and through its counsel, pursuant to Rule 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules or Rules), hereby files Complainant's Response to Respondents' Motion *in Limine* to Preclude U.S. EPA's Evidence of Prior History. 40 C.F.R. § 22.16.

I. Standard for Motions *in Limine*

Motions *in limine* are not referenced in the Consolidated Rules. However, the Rules provide that "the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). Where there are no administrative rules on a subject, it is appropriate to consult federal court practice, Federal Rules of Civil Procedure, or the Federal Rules of Evidence as guidance in analogous situations. *See In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 1997 EPA App. LEXIS 27, *29-30, (Sep. 30, 1997) (holding that when the Part 22 rules are not explicit on a particular procedural issue, the Board is authorized to interpret the rules and determining what practice to follow,

noting that the Board has "often looked to decisions of the federal courts on issues of procedure", and applying a line of federal court cases to an affirmative defense issue). In federal court practice, 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). Administrative courts have noted that "[u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2012 EPA ALJ LEXIS 11, *9 (Feb. 1, 2012) (citations omitted). Accordingly, motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). *See also In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, **22-23 (June 2, 2011) and *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9, *6-7 (June 2, 2011).

II. Discussion

In Respondents' Motion *in Limine* to Preclude U.S. EPA's Evidence of Prior History, Respondents assert that Complainant's exhibits CX49-CX53 and CX97-111, which "[Complainant] claims relates to environmental compliance history of Respondents", should be excluded.

A. History of Violations is a Proper Criteria for Determining RCRA Civil Penalties

Respondents first argue that the prior history of violations is not a proper criteria for determining RCRA civil penalties. While prior history of noncompliance by a respondent is not a penalty determination factor under Section 3008 of RCRA, it is a consideration listed in EPA's

June 2003 RCRA Civil Penalty Policy ("RCRA Penalty Policy"). 42 U.S.C. § 6928; CX68 at EPA17395-96. Specifically, the RCRA Penalty Policy states:

> c. History of Noncompliance (upward adjustment only)
>
> Where a party previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the party was not deterred by the previous enforcement response. Unless the current or previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.
>
> Some of the factors that enforcement personnel should consider in making this determination are as follows:
>
> • how similar the previous violation was;
> • how recent the previous violation was;
> • the number of previous violations; and
> • violator's response to previous violation(s) in regard to correction of problem.
>
> A violation generally should be considered "similar" if the Agency's or State's previous enforcement response should have alerted the party to a particular type of compliance problem. A previous violation of the same RCRA or State requirement would constitute a similar violation.
>
> Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute. Enforcement personnel should examine multimedia compliance by the respondent and, where there are indications of a history of noncompliance, the penalty should be adjusted accordingly.
>
> For the purposes of this section, a "previous violation" includes any act or omission for which a formal or informal enforcement response has occurred (e.g., EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree).[35] The term also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.
>
> [35] Note that while in the context of this Policy the term "previous violation" may include notices of violation, this Policy does not address the issue of when an enforcement action is initiated in the context addressed in Harmon Industries, Inc., v. Browner, 191 F.3d 894 (8th Cir. 1999). See *In re: Bil-Dry Corporation*, 9 E.A.D. 575 (EAB, 1/18/01).

> In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, enforcement personnel should attempt to ascertain who in the organization had control and oversight responsibility for compliance with RCRA or other environmental laws. The violation will be considered part of the compliance history of any regulated party whose officers had control or oversight responsibility.
>
> In general, enforcement personnel should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, enforcement personnel should be wary of a party changing operators or shifting responsibility for compliance to different persons or entities as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection.
>
> Consequently, the adjustment for history of noncompliance probably should apply unless the violator can demonstrate that the other violating corporate facilities are independent.
> CX68 at EPA17395-96.

This factor can be used to adjust the sum of the gravity-based and multi-day penalty components for any given violation upwards by as much as 25% of that sum in ordinary circumstances and from 26-40% in unusual circumstances. CX68 at EPA17393.

While the Presiding Officer in this matter is not required to follow the RCRA Penalty Policy, the Consolidated Rules provide that the Presiding Officer "shall consider any civil penalty guidelines issued under the Act". 40 C.F.R. § 22.27(b). Both Presiding Officers and the Environmental Appeals Board have repeatedly relied upon EPA's penalty policies when calculating the appropriate penalty for a given violation – including in RCRA cases. *In re: M.A. Bruder and Sons, Inc.*, RCRA (3008) Appeal No. 01-04, 2002 EPA App. LEXIS 12, *38 (2002) ("...we believe that the [predecessor to the 2003 RCRA Penalty Policy, which also included the history of noncompliance factor] can be applied in a way that would ensure an appropriate

penalty, and choose to use it in determining the penalty we assess"); *In the Matter of: Aguakem Caribe, Inc.*, Docket No. RCRA 02-2009-7110, *179, 2011 EPA ALJ LEXIS 24 (December 22, 2011) (court found that EPA properly assessed a penalty using the 2003 RCRA Civil Penalty Policy); *In the Matter of Blackington Common, LLC et al.*, Docket No. RCRA 01-2007-0164, 2009 EPA ALJ LEXIS 4, **22-24 (April 23, 2009) (court found that penalty calculated by EPA using statutory penalty factors and the 2003 RCRA Civil Penalty Policy was appropriate); *In the Matter of: Zaclon, Inc., et al.*, Docket No. RCRA-05-2004-0019, 2007 EPA LAJ LEXIS 20 (June 4, 2007) (court found the 1990 and 2003 RCRA Civil Penalty Policies not to be materially different for purposes of penalty calculation, and using the penalty calculation methodology found in both); *In the Matter of Goodman Oil Company et al.*, Docket No. RCRA-10-2000-0113, 2003 EPA ALJ LEXIS 4, **94-95 (January 30, 2003)(RCRA UST case where EPA used the RCRA UST penalty policy – including a history of noncompliance factor – to calculate penalty and the court adopted some but not all of the EPA calculation); *In the Matter of: Royster Company*, Docket No. RCRA-III-195, 193 EPA ALJ LEXIS 234, *59 (December 17, 1993)(applying a predecessor to the 2003 RCRA Penalty Policy, which also included the history of noncompliance factor); *In the Matter of: Environmental Protection Corporation*, Docket No. RCRA-09-86-0001, 1989 EPA ALJ LEXIS 19, **26-28 (October 24, 1989)(applying a predecessor to the 2003 RCRA Penalty Policy, which also included the history of noncompliance factor). *See also Titan Wheel Corp. v. U.S. EPA*, 291 F.Supp.2d 899 (S.D. Iowa 2003) (court affirmed Environmental Appeals Board Decision on penalty which in had affirmed a penalty assessed by an Administrative Law Judge using a predecessor to the 2003 RCRA Penalty Policy); and, *In re: Pyramid Chemical Company*, RCRA-HQ-2003-0001, 2004 EPA App. LEXIS 32, *76 at footnote 38 (September 16, 2004)(citing to the 2003 RCRA Civil Penalty

Policy with approval). Perhaps most importantly, the Court has already cited to the 2003 RCRA Penalty Policy with approval in this very matter. *In the Matter of: Carbon Injection Systems LLC, et al.*, Docket NO. RCRA-05-2011-0009, 2012 EPA ALJ LEXIS 6, **12-13 (February 14, 2012).

B. EPA Properly Considered History of Noncompliance under the RCRA Penalty Policy

1. The prior history can include other companies owned by the Respondents

Section IX.A.3.c of the RCRA Penalty Policy plainly states that "Where a party previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the party was not deterred by the previous enforcement response." CX68 at EPA17395-96. Additionally, "[t]he Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection." CX68 at EPA17396.

In this case, Respondents have informed EPA that Respondents Forster and Lofquist were in leadership positions in General Environmental Management LLC ("GEM"), Recycling and Treatment Technologies LLC (RTT Ohio) and Recycling and Treatment Technologies of Detroit LLC (RTT Detroit), among others. CX 71 at EPA17470, CX17473 and CX17475. Furthermore, some of the exhibits Respondents seek to exclude were directed at Respondent Forster or Respondent Lofquist or both: CX100 (Forster and Lofquist); CX105 (Lofquist); CX106 (Forster and Lofquist); CX107 (Lofquist); CX108 (Lofquist); and, CX109 (Forster). Complainant believes that violations found at facilities, other than CIS, which were owned by Forster and Lofquist entities is clear evidence that the party was not deterred by the previous

enforcement response, and are akin to "noncompliance by many divisions or subsidiaries of a corporation". CX68 at EPA17396. Since history of noncompliance is relevant to proper penalty assessments, and these documents provide evidence of history of noncompliance, the documents are relevant, material, have probative value, and should not be excluded for the reasons argued by Respondents.

2. It Was Appropriate to Consider the Specific Instances of Non Compliance Listed in the Penalty Narrative

a. Notices of Violation

Respondents argue that consideration of notices of violation (where there is no adjudication) in the calculation of the penalty in this matter, will violate due process. U.S.C.A. Const. Amend 5. Respondents cite to three cases in their argument, although it is unclear how these cases support Respondents' argument. The first case is *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). This is a Clean Air Act ("CAA") case wherein the court found that the CAA contains provisions allowing EPA to issue Administrative Compliance Orders ("ACOs") directing extensive and costly activities and allowing EPA to pursue "severe civil and criminal penalties" for noncompliance with the terms of an ACO. *Id.* at 1239. The court found that these provisions violated due process and held that the violator of the ACO was "free to ignore the ACO without risking the impositions of penalties for noncompliance with its terms." *Id.* This case has nothing to do with RCRA, the imposition of penalties for failing to comply with regulations, or EPA penalty policies. It is not applicable to the facts in this case. Respondents also rely upon *In re: Employers Insurance of Wausau and Group Eight Technology, Inc.*, Docket Nos. TSCA-V-C-62-90 and TSCA-V-C-66-90, 1997 EPA App. LEXIS 1 (February 11, 1997). This is a Toxic Substances Control Act case which makes no mention of due process. 15 U.S.C. §§ 2601-2659d. The EAB in *Wausau* vacated the Presiding Officer's

Initial Decision which rejected EPA's proposed penalty and remanded the matter for further penalty proceedings. Again, it is unclear why Respondents cited to the case. Finally, Respondents cite to *In re: Ocean State Asbestos Removal, Inc.*, Docket No. CAA-I-93-1054, 1998 EPA App. LEXIS 82 (March 13, 1998) - another CAA case. In this case the EAB *explicitly disagreed* with the notion that increasing a penalty due to a prior violation was not adjudicated violated due process. *Id.* at *48. The court held "[w]e believe that the imposition of a penalty increase based on a prior notification of an alleged violation, even if there is no adjudication of liability for the violation, promotes the statutory purpose of assuring the violations will not occur." *Id.* at *58. Significantly, the court held:

> In holding that the respondent is entitled to notice and hearing on the alleged prior violation before any of the underlying facts may be considered in connection with the assessment of a penalty imposed for a subsequent violation, the Presiding Officer made a significant conceptual error. The Presiding Officer viewed the increase of the penalty imposed for the second violation as the imposition of a penalty for the alleged prior violation. This is simply not correct.

Id. at *85. The court also explained in detail the value of considering a prior notification when calculating a penalty:

- A prior notification can serve as evidence of notice of the respondent's knowledge of the requirements cited in the notification and the degree of fault associated with the subsequent violation;
- A prior notification followed by a subsequent violation is evidence of the respondent's failure to take steps to prevent violations and to comply voluntarily with the regulations;
- A history of prior notices not only is evidence that the respondent was aware of the required compliance, but is also evidence that the respondent was aware of the sanction for noncompliance.

Id. at **58-61.

Section IX.A.3.c of the RCRA Penalty Policy states that "[f]or the purposes of this section, a "previous violation" includes any act or omission for which a formal or informal enforcement response has occurred (e.g., EPA or State notice of violation, warning letter,

complaint, consent agreement, final order, or consent decree)." Additionally, "[t]he term also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists." Clearly the focus is on whether or not an enforcement response has occurred, not whether or how that enforcement response has been resolved.

CX97, CX98, CX105, CX106, CX107, CX108, CX109, CX110 and CX111 are notices of violation. Based on exhibits submitted by both EPA and Respondents, it appears that these notices of violation were either resolved without additional enforcement actions being taken and without adjudication of the violations alleged, or they remain unresolved.[1] But even without a formal adjudication, the notices of violation have value to and properly inform the penalty calculations here, as described in the portion of *Ocean State* quoted above. 1998 EPA App. LEXIS 82, **58-61. Additionally, following the Respondents' argument to its logical conclusion, violations which were settled prior to an adjudication of the matter should never be considered in the calculation of a penalty for a subsequent violation – therefore, a violator which has had tens, hundreds or thousands of violations which were settled prior to hearing or trial would have no fear of the "history of noncompliance" factor in the RCRA Penalty Policy. This result would thwart the intent of the RCRA Penalty Policy, and the statute itself. EPA does not argue that types of evidence of history of noncompliance must be weighted differently when settling upon an adjustment amount, but this is completely different than not weighing them at all, as Respondent suggests. See *In the Matter of Goodman Oil Company et al.*, Docket No.

[1] CX 97 (resolved at the inspection), CX98 (resolved as noted in RX4), CX105 (resolved as noted in RX6), CX106 (apparently unresolved – see RX5, CX107, RX3, CX108, RX9), CX109 (resolved during inspection), CX110 (resolved as noted in RX10) and CX111 (unresolved).

RCRA-10-2000-0113, 2003 EPA ALJ LEXIS 4, **94-95 (January 30, 2003) (RCRA UST case where court held that field citations should be given less weight than other enforcement tools, particularly where they are remote in time, the violation was corrected timely and the penalty paid). Again, since history of noncompliance is relevant to proper penalty assessments, evidence of history of noncompliance such as notices of violation is relevant, material and has probative value. CX97, CX98, CX105, CX106, CX107, CX108, CX109, CX110 and CX111 provide evidence of history of noncompliance, and as explained above, are therefore relevant, material, have probative value, and should not be excluded for the reasons argued by Respondents.

b. Notice of Violation for Odor Violations at GEM and RTT Detroit

Included among EPA's exhibits are CX99, CX100 and CX110. CX99 is a CAA complaint brought by the State of Ohio against GEM, Respondent Forster and Respondent Lofquist alleging 3 counts involving the failure to verify organic emissions capture efficiencies at three sources. This complaint was resolved in a settlement whereby GEM, Respondent Forster and Respondent Lofquist agreed to provide certain injunctive relief, detailed in the settlement document, and including implementing a potential Nuisance Odor Abatement Plan, implementing a Community Outreach and Response Plan, and providing certain notifications to regulators. See CX100. CX111 is a CAA notice of violation regarding odor violations and operating without a permit, which was issued to RTT Detroit and which remains unresolved. The violations cited in both documents are evidence of evidence of history of noncompliance and are relevant, material and have probative value.

Respondents argue that these violations are not admissible because they address violations of a different statute (the CAA), the violations arise from different types of operations, and the companies to whom the complaint and notice where issued are not owned by the

Respondents in this matter. However, as noted above, the RCRA Penalty Policy specifically states that "a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA *or another statute*." CX68 at EPA17395-96 (emphasis added). The RCRA Penalty Policy actually directs enforcement personnel to examine multimedia compliance by the respondent and, where there are indications of a history of noncompliance, the penalty should be adjusted accordingly. CX68 at EPA17396. Furthermore, the operations of CIS, GEM and RTT Detroit *are* similar – all three facilities receive or have received hazardous waste without a RCRA permit (which the facilities claim is appropriate under certain recycling and treatment exemptions contained in RCRA). In addition, Respondents have described the facilities as follows:

- CIS: a full service, sole source provider to WCI Steel of various fuels, including reclaimed oil;
- GEM: industrial wastewater treatment and recycling; and
- RTT Detroit: oil recycling, wastewater pretreatment facility

CX46 at EPA17145; CX71 at EPA17470 and EPA17473. Finally, Respondents Forster and Lofquist held leadership positions at GEM and RTT Detroit, and as noted above, environmental noncompliance by the many companies Respondents Forster and Lofquist control are akin to "noncompliance by many divisions or subsidiaries of a corporation". CX68 at EPA17396. CX99, CX100 and CX110 provide evidence of history of noncompliance, and as explained above, are therefore relevant, material, have probative value, and should not be excluded for the reasons argued by Respondents.

c. Information Regarding GEM Fire

Included among EPA's exhibits are CX101, CX102, CX103 and CX104. Respondents argue that the cause of the fire was never established, the documents do not reflect violations of

environmental laws, and GEM is not a respondent to this proceeding. Complainant believes that if the cause of the fire was never established, that fact does not affect the admissibility of the documents. The documents are relevant, material, and have probative value. CX102 is a report from the City of Cleveland Department of Public Safety Division of Fire Prevention Bureau detailing the releases of oil to nearby sewers and the Cuyahoga River as the result of a fire at the GEM facility. The report notes that "Notice #15840 was issued to Mr. Lofquist stating a hazardous condition, to cease all operations and clean up the chemical spillage." CX102 at EPA18611. CX101 and CX103 provide further details on the oil release/chemical spillage as recorded by the federal government. CX104 is a letter from a citizen group which also provides information regarding the release/chemical spillage.[2] As explained above, because there was a notification (Notice #15840) given to a respondent in this action (Respondent Lofquist) regarding an environmental matter (oil release/chemical spillage), this evidence a history of noncompliance is relevant, material has probative value and should not be excluded for the reasons argued by Respondents. See *In the Matter of: Zaclon, Inc., et al.*, 2007 EPA ALJ LEXIS 20, *13 (RCRA matter where court denied motion *in limine* wherein Respondent sought to exclude violations documented by a local fire department and indicated that the documents

[2] CX104 is a letter from a citizen group which provides more information regarding GEM – well beyond the release/chemical spillage which occurred on April 20, 2006. The letter details a history at GEM of violating local, state and federal laws. See *In the Matter of Strong Steel Products, LLC*, Docket No. CAA-5-2003-0009, 255 EPA ALJ LEXIS 7, **15-16 (February 18, 2005) ("regardless of whether the CAA Penalty Policy provides for it or not [an Administrative Law Judge] may consider citizens' complaints....in determining any penalty in this case").

containing the information may be relevant to several factors listed in the RCRA Penalty Policy, including "history of noncompliance").

d. RCRA Violations at GEM, RTT Detroit, RTT Ohio

Respondents also seek to exclude CX97, CX98, CX105, portions of CX106, CX107 (related to the violations cited in CX106), CX108 (related to the violations cited in CX106), CX109 and CX110, stating that they "reflect occasional isolated incidents" which "related primarily to housekeeping matters" that were abated at the time of the inspection or for which no further action was required, and which did not occur at the CIS facility. EPA does not agree that the violations cited in these documents were occasional or isolated – rather, they depict a group of facilities under the control of Respondents Forster and Lofquist which were regularly cited for environmental violations. They clearly show a pattern of disregard of environmental requirements contained in RCRA. CX68 at EPA17395-96. Furthermore, EPA does not agree that the violations cited can be dismissed as housekeeping matters. They include failure to: employ proper container management (CX97); operating a hazardous waste treatment and storage facility without a RCRA permit (CX98); storage of hazardous waste without a RCRA permit (CX105, CX106, CX107); failure to conduct a hazardous waste determination (CX106); failure to comply with applicable hazardous waste tank system requirements (CX106); and, failure to properly train personnel (CX107). There are literally dozens of violations cited in these documents. Significantly, one of them very clearly put Respondent Lofquist on notice with regarding to the violations in this case:

> Ohio EPA has explained that spent materials being used as carbon substitutes in devices which also recover energy (e.g., boilers, industrial furnaces, etc.) are not commercial chemical substitutes for carbon sources, but are wastes being burned for energy recovery purpose. As such, if the wastes are hazardous, then the material would be a hazardous waste. Please see links [refers to email communication between OEPA and Innovative Waste Management personnel]

CX108 at EPA18645. Finally, as noted above, while the violations discussed in these exhibits did not occur at the CIS facility, they occurred at facilities controlled by Respondents Forster and Lofquist. As noted above, environmental noncompliance by the many companies Respondents Forster and Lofquist control are akin to "noncompliance by many divisions or subsidiaries of a corporation". CX68 at EPA17396. For these reasons, the information in CX97, CX98, CX105, CX106, CX107 CX108, CX109 and CX110 is relevant, material and has probative value, and should not be excluded for the reasons argued by Respondents.

e. Prior Violations at GEM Facility

Respondents also seek to exclude CX106, CX107 and CX108 because they did not occur at the CIS facility, CIS and GEM have different types of operations, and the violations were not adjudicated. As noted above, environmental noncompliance by one of the many companies Respondents Forster and Lofquist control are akin to "noncompliance by many divisions or subsidiaries of a corporation". CX68 at EPA17396. Furthermore, matter how similar or different the violations are, they are environmental violations and reflect the general indifference Respondents Forster and Lofquist have for environmental regulation. The fact that the violations were not adjudicated is addressed above. For these reasons, the information in CX106, CX107, and CX10 are relevant, material and have probative value, and should not be excluded for the reasons argued by Respondents.

f. Criminal Violations by Respondent Forster and GEM at the GEM facility

Finally, Respondents vigorously seek to exclude exhibits related to a criminal case involving GEM and Respondent Forster. The counts in the information were:

- Count 1: On or about December 8, 2004, defendants Scott Forster and GEM did knowingly and willfully make a false, fraudulent, and fictitious material statement and

representation, in that they stated to the Northeast Ohio Regional Sewer District (NEORSD) that unapproved wastewater was not processed by GEM and not discharged into the NEORSD sewer system, when in fact defendants Scott Forster and GEM knew that GEM has processed the unapproved wastewater and discharged it into the NEORSD sewer system (CWA violation);

- Count 2: From on or about January 1, 2002 and continuing through July 31, 2005, on numerous occasions, GEM did knowingly and willfully make a false, fraudulent and fictitious material statement and representation, in that employees of defendant GEM completed the second transporter portion of hazardous waste manifests to indicate that drums of hazardous waste were in transit, when in fact the drums of hazardous waste were not in transit, but actually were being stored at the GEM facility (RCRA violation); and
- Count 3: From on or about January 1, 2004 and continuing through on or about March 31, 2005, on numerous occasions defendant GEM knowingly made and delivered as true such a certificate or writing, containing statements which GEM knew to be false, in that employees of defendant GEM completed Monthly Operating Reports that were submitted to the NEORSD showing batched of wastewater discharged to the sewer system were in compliance with GEM's total solvent permit limit, when those batches were above the GEM permit limit for total solvent (CWA violation).

CX 49 at EPA17154, EPA17156-7 and EPA 17159. Respondent seek to exclude this evidence of noncompliance by attempting to justify the actions of GEM and Respondent Forster, asserting that GEM "vigorously denied that any of the conduct complained of amounted to noncompliance with any environmental requirement", and stating that the matters addressed in the criminal matter did not involve the CIS facility.

The fact that the matters addressed in the criminal matter did not involve the CIS facility does not render the evidence inadmissible, as discussed above. More importantly, Respondents ignore the fact that GEM (as represented by Respondent Lofquist) *pled guilty* to the violations and received punishment from the court:

- Respondent Forster: probation for one year, a $20,000 fine and an assessment (essentially court fees) of $100; and
- GEM: probation for one year and an assessment (essentially court fees) of $925 (presumable the parties agreed, as discussed in GEM's plea agreement, to recommend to the court that GEM not pay a fine because Gem demonstrated to the satisfaction of the Office of the United States Attorney that GEM has an inability to pay a fine).

CX51 at EPA17186; CX52; CX53. Furthermore, this evidence of a criminal activity should be weighted especially heavily in the penalty calculation because it involved *knowing and willful* actions on the part of Respondent Forster and GEM to violate federal environmental laws (including RCRA) which required the imposition of punishment by the federal court, in part to deter future criminal conduct of the defendants as well as others (punishment for purposes of deterrence being a foundation of criminal law in the United States). In other words, this is particularly compelling evidence of a history of noncompliance. As such, these documents are relevant, material and have probative value, and should not be excluded for the reasons argued by Respondents.

III. Conclusion

For the foregoing reasons, Respondents' Motion *in Limine* to Preclude U.S. EPA's Evidence of Prior History, specifically exhibits CX49-CX53 and CX97-111, should be denied.

Respectfully Submitted,

Counsel for EPA:

5/17/12
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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 Response to Respondents' Motion *in Limine* to Preclude U.S. EPA's Evidence of Prior History", dated May 17, 2012, was sent this day in the following manner to the addressees listed below:

Original and one copy hand-delivered to:

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Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge
U.S. EPA Office of the Hearing Clerk
1099 14th St. NW
Suite 350, Franklin Court
Washington, DC 20005

5/17/12
Date

Charles Rodriguez, Student Aide

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	**Docket No. RCRA-05-2011-0009**
	)	
Carbon Injection Systems, LLC,	)	
Scott Forster,	)	
Eric Lofquist,	)	
	)	
Respondents.	)	
	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OR TESTIMONY RELATING TO THE "PRIOR HISTORY" OF SCOTT FORSTER

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant), by and through its counsel, pursuant to Rule 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules or Rules), hereby files Complainant's Response to Respondents' Motion *in Limine* to Preclude Evidence or Testimony Relating to the "Prior History" of Scott Forster. 40 C.F.R. § 22.16.

I. Standard for Motions *in Limine*

Motions *in limine* are not referenced in the Consolidated Rules. However, the Rules provide that "the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). Where there are no administrative rules on a subject, it is appropriate to consult federal court practice, Federal Rules of Civil Procedure, or the Federal Rules of Evidence as guidance in analogous situations. *See In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 1997 EPA App. LEXIS 27, *29-30, (Sep. 30, 1997) (holding that when the Part 22 rules are not explicit on a particular procedural issue, the Board is authorized to interpret the rules and determining what practice to follow,

noting that the Board has "often looked to decisions of the federal courts on issues of procedure", and applying a line of federal court cases to an affirmative defense issue). In federal court practice, 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). Administrative courts have noted that "[u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2012 EPA ALJ LEXIS 11, *9 (Feb. 1, 2012) (citations omitted). Accordingly, motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). *See also In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, **22-23 (June 2, 2011) and *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9, *6-7 (June 2, 2011).

II. Discussion

In Respondents' Motion *in Limine* to Preclude Evidence or Testimony Relating to the "Prior History" of Scott Forster, Respondents seek to exclude CX49, CX50 and CX52 (and related testimony), all of which relate to a criminal case involving Respondent Forster and one of the companies where he was an officer, General Environmental Management LLC ("GEM"). The counts in the information were:

- Count 1: On or about December 8, 2004, defendants Scott Forster and GEM did knowingly and willfully make a false, fraudulent, and fictitious material statement and representation, in that they stated to the Northeast Ohio Regional Sewer District (NEORSD) that unapproved wastewater was not processed by GEM and not discharged into the NEORSD sewer system, when in fact defendants Scott Forster and GEM knew that GEM has processed the unapproved wastewater and discharged it into the NEORSD sewer system (Clean Water Act violation);

- Count 2: From on or about January 1, 2002 and continuing through July 31, 2005, on numerous occasions, GEM did knowingly and willfully make a false, fraudulent and fictitious material statement and representation, in that employees of defendant GEM completed the second transporter portion of hazardous waste manifests to indicate that drums of hazardous waste were in transit, when in fact the drums of hazardous waste were not in transit, but actually were being stored at the GEM facility (RCRA violation); and
- Count 3: From on or about January 1, 2004 and continuing through on or about March 31, 2005, on numerous occasions defendant GEM knowingly made and delivered as true such a certificate or writing, containing statements which GEM knew to be false, in that employees of defendant GEM completed Monthly Operating Reports that were submitted to the NEORSD showing batched of wastewater discharged to the sewer system were in compliance with GEM's total solvent permit limit, when those batches were above the GEM permit limit for total solvent (Clean Water Act violation).

CX 49 at EPA17154, EPA17156-7 and EPA 17159. Respondent seek to exclude this evidence of noncompliance (along with Respondent Forster's guilty plea and the judgment by the court in the matter) by arguing that the violation in the criminal case involving Respondent Forster (Count 1) is not similar to the violations in this case, does not involve the CIS facility, and the criminal violation was "a one-time incident" that resulted in "no environmental harm" which was "quickly corrected".

To begin, Respondents are correct the criminal violation committed by Respondent Forster did not involve the CIS facility. However, Section IX.A.3.c of the RCRA Penalty Policy plainly states that "Where a party previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the party was not deterred by the previous enforcement response." CX68 at EPA17395-96. Additionally, "[t]he Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection." CX68 at EPA17396.

In this case, Respondents have informed EPA that Respondent Forster was in leadership positions at General Environmental Management LLC ("GEM"), Recycling and Treatment

Technologies LLC (RTT-Ohio) and Recycling and Treatment Technologies of Detroit LLC (RTT-Detroit), among others. CX 71 at EPA17470, CX17473 and CX17475. Furthermore, some of the exhibits Respondents seek to exclude were directed at Respondent Forster: CX100 (Forster and Lofquist); CX106 (Forster and Lofquist); and, CX109 (Forster). Complainant believes that violations found at facilities, other than CIS, which were controlled by Forster is clear evidence that Respondent Forster was not deterred by the previous enforcement response, and are akin to "noncompliance by many divisions or subsidiaries of a corporation". CX68 at EPA17396. Therefore, violations found at facilities, other than CIS, which were controlled by Forster are evidence of his history of noncompliance under the RCRA Penalty Policy, and are relevant to a penalty calculation in this matter.

To address Respondents' second argument, while the criminal violation is in some ways different from the violation in this case, the RCRA Penalty Policy advocates consideration of prior violation under different statutes and at different facilities:

> Where a party previously has violated federal or state environmental laws at the same *or a different site*, this is usually clear evidence that the party was not deterred by the previous enforcement response… a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA *or another statute*.

CX68 at EPA17395-96 (emphasis added). Thus, consideration of the criminal violation by Respondent Forster as part of penalty calculation is appropriate.

Respondents' final argument, that the criminal violation resulted in "no environmental harm" and was "quickly corrected" and therefore should be excluded, is misleading. First, the potential for harm when a person gives a false statement to an environmental regulator regarding the discharge of industrial wastewater into a sewer system is significant. While there is no evidence of actual environmental harm contained in CX49, CX50 and CX52, the potential for

harm must be recognized. Second, Respondents assert that the violation was quickly corrected when the NEORSD ultimately approved the waste stream in question. However, the violation was that Respondent Forster knowingly and willfully made a false, fraudulent, and fictitious material statement and representation to environmental officials regarding GEM processing unapproved wastewater and discharging it into the NEORSD sewer system. Whether and when the false statement was corrected would address the actual violation – which involved a false statement not an unapproved waste - but Respondents are silent on this issue. Furthermore, this effort by Respondents to minimize the environmental crime committed by Respondent Forster is incongruous with the magnitude of the punishment given by the court to Respondent Forster after his guilty plea: probation for one year, a $20,000 fine and an assessment (essentially court fees) of $100. This was no small matter. Since history of noncompliance is relevant to proper penalty assessments, and these documents provide evidence of the history of criminal environmental noncompliance by Respondent Forster, the documents are relevant, material, have probative value, and should not be excluded for the reasons argued by Respondents.

III. Conclusion

For the foregoing reasons, Respondents' Motion *in Limine* to Preclude Evidence or Testimony Relating to the "Prior History" of Scott Forster, seeking to exclude CX49, CX50 and CX52 (and related testimony), should be denied.

Respectfully Submitted,

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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 Response to Respondents' Motion *in Limine* to Preclude Evidence or Testimony Relating to the "Prior History" of Scott Forster", dated May 17, 2012, was sent this day in the following manner to the addressees listed below:

Original and one copy hand-delivered to:

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Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge
U.S. EPA Office of the Hearing Clerk
1099 14th St. NW
Suite 350, Franklin Court
Washington, DC 20005

5/17/12
Date

Charles Rodriguez, Student Aide

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	**Docket No. RCRA-05-2011-0009**
	)	
Carbon Injection Systems, LLC,	)	
Scott Forster,	)	
Eric Lofquist,	)	
	)	
Respondents.	)	
	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' OMNIBUS MOTION *IN LIMINE* ON "ROUTINE" MATTERS

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant), by and through its counsel, pursuant to Rule 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules or Rules), hereby files Complainant's Response to Respondents' Omnibus Motion *in Limine* on "Routine" Matters. 40 C.F.R. § 22.16.

I. Standard for Motions *in Limine*

Motions *in limine* are not referenced in the Consolidated Rules. However, the Rules provide that "the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). Where there are no administrative rules on a subject, it is appropriate to consult federal court practice, Federal Rules of Civil Procedure, or the Federal Rules of Evidence as guidance in analogous situations. *See In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 1997 EPA App. LEXIS 27, 7 E.A.D. 318 *29-30, (Sep. 30, 1997) (holding that when the Part 22 rules are not explicit on a particular procedural issue, the Board is authorized to interpret the rules and determining what practice to

follow, noting that the Board has "often looked to decisions of the federal courts on issues of procedure", and applying a line of federal court cases to an affirmative defense issue). In federal court practice, 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). Administrative courts have noted that "[u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2012 EPA ALJ LEXIS 11, *9 (Feb. 1, 2012) (citations omitted). Accordingly, motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). *See also In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, **22-23 (June 2, 2011) and *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9, *6-7 (June 2, 2011).

II. Law and Argument

In Respondents' Omnibus Motion *in Limine* on "Routine" Matters, Respondents request that this Court exclude ten forms of documentary evidence or oral testimony from the upcoming proceeding in this matter. EPA will address each of those requests and separately express its agreement or disagreement to each.

1. U.S. EPA and Respondents should be precluded from introducing any documents, exhibits, or witness testimony that have not been included or identified in that party's Prehearing Exchange (as supplemented or amended).

Pursuant to 22.19(a)(1) of the Consolidated Rules, Respondents request that any documentary evidence that has not been submitted or any witness testimony that has not been described by U.S. EPA to Respondents in a prehearing exchange must be excluded from the

hearing. EPA concurs with this request as it applies to both EPA and Respondents, equally. In agreeing, EPA reserves the right to file motions for leave to supplement its prehearing exchange and move to admit the documents or testimony described included in any supplement, if granted.

2. U.S. EPA should not be precluded from introducing opinion testimony from anyone not identified as an expert.

Respondents request that any witness that has not been identified and disclosed as an expert be barred from offering opinion testimony. EPA agrees that lay witnesses testifying on behalf of either party should be barred from offering opinion testimony, but EPA requests that this Court acknowledge certain limited circumstances, in which opinion testimony by a lay witness is proper.

Federal Rule of Evidence 701 explains that a lay witness may offer testimony in the form of opinions or inferences if that testimony is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony of the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Lay witnesses may "offer an opinion on the basis of relevant historical or narrative facts that the witness has perceived." *In the Matter of Service Oil*, Inc., Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 9, *14 (March 17, 2006) (citing *MCI Telecomm. Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990)). Accordingly, administrative courts have held that "testimony which states the witness' own understanding of what the regulation means may assist the Presiding Judge in understanding the witness' factual or expert testimony, and may be admissible." *In the Matter of Strong Steel Products, LLC*, Docket No. RCRA-5-2001-0016, CAA-5-2001-0020 & MM-5-2001-0006, 2003 EPA ALJ LEXIS 191, *60 (Oct. 27, 2003). Furthermore, "[t]estimony which simply explains, as a matter of background, the regulatory scheme, or any relevant changes in the regulations, may assist the Presiding Judge at the hearing

in understanding the factual testimony, and is admissible." *Id.* at *60-61. Therefore, testimony from EPA witnesses that explains the background, amendments, regulatory scheme, and personal understanding of the applicable regulations should not be barred, as Respondents request.

Additionally, a penalty witness should not be barred from testifying as to the applicable penalty policy and the calculation of the penalty at issue. Both federal and administrative courts have recognized that a penalty witness "is not a fact witness but is akin to an expert witness, having knowledge of, training on, and experience with the particular penalty policies and their application to various cases and factual situations." *Id.* at *53-54 (citing *Consolidation Coal Company v. Director, Office of Workers Compensation Programs*, 94 F.3d 885, 893 (7th Cir. 2002)). Therefore, if a witness in this proceeding demonstrates an expertise as to RCRA penalty assessments, his testimony on issues related to the calculation of a penalty should be admissible.[1]

3. U.S. EPA should not be precluded from introducing evidence based on Respondents third "routine" request.

Respondents request that this Court preclude EPA from "introducing evidence regarding the activities of the Respondents after the relevant events in this case." Respondents' Motion at 2. The nature of this request is vague and overly broad. This Court has not yet had the opportunity to decide, and Respondents do not even offer their opinion, on which events are relevant to this case. Therefore, having not decided which events are relevant, the Court cannot define which activities of Respondents occurred after such events. Instead, EPA asserts that, as directed in 40 C.F.R. § 22.22, this Court should admit all evidence which is not irrelevant,

[1] EPA addresses the opinion testimony of EPA witness Michael Beedle in detail in EPA's Response to Respondents' Motion in Limine to Bar Certain Testimony and/or Opinions of U.S. EPA's Fact Witness Michael Beedle.

immaterial, unduly repetitious, unreliable, or of little probative value. Should EPA proffer evidence related to activities that occurred after the events that this Court eventually deems relevant, this Court should allow EPA an opportunity to explain the relevancy of such activities, and the Court can render a decision on admissibility at that time.

4. U.S. EPA should not be precluded from introducing evidence based on Respondents fourth "routine" request.

Respondents' request that U.S. EPA be precluded from introducing any speculation or argument about the substance of the testimony of any witness who is absent or unavailable, or whom Respondents did not call to testify. Once again, EPA asserts that, pursuant to 40 C.F.R. § 22.22, this Court shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. Here, Respondents attempt to create a limitation on admissibility that is not included in the Consolidated Rules. Because Respondents have not identified specific evidence or testimony to which they referring, Complainant is unable to advocate further for the admissibility of that evidence. Therefore, this Court must reserve its judgment until Respondents can identify specific evidence that they contend is inadmissible, and this Court should not preclude evidence based upon Respondents fourth "routine" request at this time.

5. Any reference to Respondents' refusal to agree or stipulate to any matter should be excluded.

Respondents assert that Respondents' refusal to agree to or stipulate to any specific fact or document is irrelevant. EPA agrees that any such evidence is inadmissible.

6. The Court should not preclude references to the receipt by Respondents, or their entitlement to receive, benefits of any kind from a collateral source such as insurance coverage.

Respondents assert that "it is black-letter law that the trier of fact may not consider insurance coverage in rendering her decision . . . ." Respondents' Motion at 3. However, what Respondents fail to mention is that FRE 411 explicitly limits this prohibition to instances in which the evidence is used to prove liability. FRE 411 continues by stating, "[t]his rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." Federal courts have allowed evidence of insurance in cases in which the insured's ability to pay damages has been put into issue. *Weiss v. La Suisse, Societe d'Assurances sur la Vie*, 293 F. Supp. 2d 397, 413 (S.D.N.Y., Nov. 25, 2003). *See also See Bernier v. Board of County Road Comm'rs for Ionia County*, 581 F. Supp. 71, 78 (W.D.Mich.1983); *DSC Communs. Corp. v. Next Level Communs.*, 929 F. Supp. 239, 248 (E.D.Tx. 1996); Wright & Miller, Federal Prac. & Proc. § 5368 (Plaintiffs have sometimes been allowed to show the existence of insurance in response to "poor-mouthing" by defendants). Because Respondents have claimed an inability to pay the penalty, Respondents have put their insurance coverage at issue. Therefore, Respondents' sixth "routine" request should be denied.

7. Any evidence of settlement negotiations between the parties should be excluded.

Respondents request that any evidence relating to settlement negotiations must be excluded from hearing. EPA does not oppose this request.

8. Non-party fact witnesses, excepting a party's designated representative, should be excluded during the hearing (except when testifying).

Respondents request that all non-party fact and expert witnesses, excepting a party's designated representative, should be excluded during the hearing. While EPA agrees that all non-party fact witnesses, excepting a party's designated representative, should be excluded from

the hearing, EPA does not agree that expert witnesses should be excluded as well. By listening to the testimony of opposing experts, expert witnesses are not only better prepared to provide clear and concise testimony for the Court's benefit, but also better able to assist counsel in cross examining that opposing expert. An expert witness is unlikely to benefit from any "unfair advantage" obtained from hearing other witnesses, as he is charged with basing his opinions on all of the facts at issue. Furthermore, every expert witness should have already signed this Court's October 26, 2011 Protective Order; therefore, Respondents' concerns regarding Confidential Business Information are baseless. Based on the foregoing, EPA requests that expert witnesses are not excluded from the hearing.

9. Non-party witnesses should be represented by counsel, if desired.

Respondents request, and EPA agrees, that counsel for non-party witnesses may be present in the courtroom while testifying, if so desired. However, as a non-party, counsel for such witnesses may in no way interject his client's position into the current proceedings (e.g., ask any question of a witness, object to any question to a witness, etc.).

10. The identification and expected sequence of witnesses and exhibits should not be provided by each party prior to hearing.

Respondents, without detailing the operation of their proposed exchange, request that each party disclose the witnesses and the sequence of their expected testimony. However, nothing in the Consolidated Rules requires the parties to provide the written order in which they intend to present their witnesses at hearing, and Respondents cite no authority to support their request. Rather, the Consolidated Rules, at 40 C.F.R. § 22.19, require only that parties file a prehearing information exchange that includes the names of any expert or other witnesses it intends to call at the hearing, a brief narrative of their expected testimony, copies of all exhibits it

intends to introduce, and a proposed penalty and penalty narrative. EPA has complied fully with 40 C.F.R. § 22.19. Therefore, Respondents' tenth "routine" request should be denied.

Should this Court find authority for Respondents' request, EPA respectfully requests that it be granted only under the following conditions: (1) that both parties be ordered to provide a list of the witnesses they intend to proffer at hearing, in writing, identifying each witness by name by 5:00pm central time on Friday, June 8, 2012 ("the List"); (2) absent unforeseen circumstances, each party must present the witnesses in the List; (3) in the event that unforeseen circumstances require a party to modify its List in any way, the party seeking to modify its List must provide written notification to the Presiding Officer and the opposing partly immediately upon learning of such unforeseen circumstances and shall be required to explain such unforeseen circumstances in this written notification; and (4) each party reserves the right to call rebuttal witnesses.

Based on the foregoing, EPA respectfully requests that this Court issue an order granting, granting with condition, or denying Respondents' requests, as detailed above.

Respectfully Submitted,

Counsel for EPA:

5/17/12
Date

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Docket No. RCRA-05-2011-0009

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Date Charles Rodriguez, Student Aide