UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

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

Respondents Carbon Injection Systems LLC ("CIS"), Scott Forster and Eric Lofquist ("Respondents"), through counsel, respectfully request that the case schedule established by the November 28, 2011 Order Scheduling Hearing, and the August 15, 2011 Order on Joint Motion for Stay of Proceedings, be revised and extended for approximately 90 days for the purpose of permitting certain third-party discovery, third-party witness depositions, motions for accelerated decisions, and for bifurcating and rescheduling the administrative hearing. Respondents request an expedited ruling on this motion. As grounds for this motion, respondents state as follows:

At the heart of this matter, U.S. EPA claims that CIS violated the Resource Conservation and Recovery Act ("RCRA") when it purchased bulk chemicals from two suppliers - JLM Chemicals, Inc. ("JLM") and International Flavors and Fragrances, Inc. ("IFF"), because U.S. EPA asserts that the bulk chemicals were not products, but rather were hazardous wastes. JLM Chemicals, Inc., IFF and CIS all have disputed U.S. EPA's characterization of the materials in question. Each of the counts in the Complaint are premised on the purchase of these materials,

which comprised a single shipment from JLM in 2005, and approximately 179 shipments from IFF in 2006 to 2008.

CIS was an intermediary in the supply of the materials to what was, at the time, WCI Steel, Inc. ("WCI"). WCI used the materials as a chemical reductant and replacement for coke in the manufacture of iron in its blast furnace in Warren, Ohio. WCI, which was CIS's sole customer, shut down its blast furnace in late 2008, and subsequently CIS became functionally defunct as a company.[1]

The parties have completed their initial and rebuttal prehearing exchanges. In its exchanges, the U.S. EPA has identified 159 exhibits totaling over twenty-four thousand (24,569) pages of documents. U.S. EPA's exchanges include voluminous amounts of information it obtained from third-parties unrelated to Respondents, including WCI Steel, Inc., Neville Chemical, Inc., Innovative Waste Management Inc., JLM Chemicals, Inc. and International Flavors and Fragrances, Inc. ("IFF"). The parties, collectively, have identified 18 lay witnesses, nine of whom are affiliated with third parties and are not employed by or associated with either U.S. EPA or the Respondents. Four such individuals are current or former employees of IFF. Additionally, the parties, collectively, have identified nine expert witnesses.

On November 28, 2011, Chief Administrative Law Judge Biro issued a scheduling order that provides for prehearing motions to be filed by January 6, 2012, for the parties to file their Joint Set of Stipulated Facts, Exhibits and Testimony by January 27, 2012, for prehearing briefs to be filed by February 10, 2012, and setting the hearing to commence on February 28, 2012, and

[1] The steel mill has changed hands several times since 2008 and is now owned by RG Steel, Inc. As well, CIS sold its assets and assigned its supply contract to Main Street Commodities, LLC. ("MSC") MSC resumed supplying material to the steel mill in 2010, but has never purchased or sold the JLM and IFF products that are the subject of U.S. EPA's complaint.

continue to March 16, 2012 as necessary. Motions for accelerated decision presently are due December 19, 2011.

1. Respondents' Need for Third-Party Discovery from IFF

The most significant issue in this case is whether the products purchased by CIS from IFF were, as claimed by U.S. EPA, hazardous wastes. The products in question have the trade names Unitene LE and Unitene AGR. In its 2010 response to U.S. EPA information requests, IFF stated "Unitene LE does not get sent off site as a waste and thus does not have a waste determination" and that "[a]s of 6/27/2007, none of this material [Unitene AGR] has been sent offsite as hazardous waste." (See, CX11, pp. EPA-10050, EPA-7926).[2] When IFF learned of the present enforcement proceeding against CIS and U.S. EPA's reliance on IFF's responses to the information requests, it wrote to U.S. EPA, stating

> It is IFF's understanding that the Complaint in [this] proceeding is based in part on UNITENE AGR that the Respondent, Carbon Injection Systems LLC ("CIS"), received from IFF. We understand from recent correspondence between the United Sates Environmental Protection Agency ("USEPA") and CIS that this product is considered by the USEPA to be a hazardous waste. The purpose of this letter is to clarify IFF's position to USEPA and to correct what appears to be a misunderstanding on the part of USEPA about certain UNITENE products that were sold by IFF to CIS. ... IFF respectfully submits that USEPA's conclusion that the material sent from IFF to CIS was hazardous waste is incorrect.

(See, CX58, pp. EPA-17223-17225). More recently, on September 29, 2011, in response to U.S. EPA's Notice of Violation, IFF again stated that IFF "disputes EPA's characterization of its materials as hazardous wastes[.] ... It is IFF's position that UNITENE LE and UNITENE AGR, which are the subject of the NOV, are co-products and therefore not wastes subject to regulation under RCRA." (See, CX60, p. EPA-17257). Respondents are simply caught in the middle of

[2] CX11 is designated CBI; however, the specific quoted statements included herein also were quoted in CX58, which is not designated CBI.

this dispute. Resolution of the disputed issue of whether IFF manufactured a co-product or generated a waste depends wholly on information about IFF's manufacturing process that is within the control of IFF. Although IFF recently was served with an NOV, IFF is not a party to this case and, thus, the opportunity for third-party discovery is necessary to provide CIS with the information it needs to defend itself against U.S. EPA's allegations.

Accordingly, prior to the prehearing exchanges, Respondents moved for an administrative subpoena in order to take the deposition of a corporate representative of IFF. In an order dated August 5, 2011, Chief Administrative Law Judge Biro deferred Respondents' motion and indicated that Respondents may renew their motion following the prehearing exchange. Not surprisingly, given the importance of this issue, in its initial prehearing exchange U.S. EPA designated two IFF employees as witnesses and identified numerous documents produced by IFF in response to two U.S. EPA information requests. Since that time, Respondents' counsel have attempted to obtain additional relevant information from IFF voluntarily, and have identified two additional IFF employees as witnesses.

Respondents are unable to adequately defend against the U.S. EPA's allegations, and establish that the materials CIS purchased from IFF were co-products and not hazardous wastes, without obtaining additional information from IFF. Such information includes, but is not limited to, a more detailed explanation of the process changes that IFF undertook at its Augusta, Georgia, plant in order to produce the Unitene products, the internal analyses and discussion at IFF as to why such material was a co-product and not a waste, the efforts undertaken by IFF to protect the commercial value of its products under trademark and to position them in the marketplace, and the knowledge IFF had regarding the use to which CIS intended to put the

Unitene products, e.g., a source of carbon as a chemical reductant and substitute for the ingredient coke for the manufacture of iron in a steel mill's blast furnace.

Respondents' counsel have requested IFF's counsel to permit them to interview the IFF witnesses. To date, IFF has declined to make its employees available for interviews. Respondents' counsel also have requested additional documents from IFF, but to date have not received such documents. Although IFF may yet make its employees that now have been specifically identified as witnesses available voluntarily, Respondents are filing, contemporaneously with this motion, a motion for administrative subpoenas to be issued to take the discovery depositions *duces tecum* of such individuals (rather than a corporate representative to be designated by IFF, as Respondents initially proposed).

Consolidated Rule 22.19 authorizes the taking of additional discovery outside of the prehearing exchange. Discovery other than the prehearing exchange may be ordered by the Presiding Officer if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1).

For the Presiding Officer to order a deposition the moving party must also meet either of two additional criteria: 1) the information sought cannot be reasonably obtained by alternative methods of discovery, or 2) there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. 40 C.F.R. § 22.19(e)(3). Although the standard for discovery under the Consolidated Rules is more

restrictive than under the Federal Rules of Civil Procedure, courts applying the Consolidated Rules have recognized that discovery will be granted if "a refusal to do so would so prejudice a party as to deny him due process." McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979); see also In the Matter of StanChem, Inc., No. CWA-2-1-95-1040, 1998 WL 743893 (E.P.A. October 14, 1998)(granting Respondent permission to take six depositions); In the Matter of Easterday Janitorial Supply Co., No. FIFRA-09-99-0015, 2001 WL 580479 (E.P.A. Jan. 31, 2001)(rejecting U.S. EPA's arguments that denying discovery in an administrative proceeding is neither fundamentally unfair nor a violation of due process, and granting Respondent leave to take three depositions).

The discovery sought by Respondents satisfies these criteria. Respondent cannot obtain the information from any source other than IFF and its employees. The information is critical to the central issue in this matter: did IFF manufacture a product or generate a waste? Respondents know of no alternative for obtaining the information sought. The additional time sought by defendants to complete discovery is reasonable given the intervening holiday season, the lack of urgency presented by this case,[3] and the significance attached to this case by U.S. EPA, which is seeking almost $2 million in civil penalties. Further, the requested deposition will not pose an unreasonable burden on U.S. EPA. The information is sought from a third party, not U.S. EPA. U.S. EPA would, of course, have the right to attend and participate in any deposition, but it is not required to do so. It also could choose to attend any deposition by telephone or video conference, as such arrangements are common, and thereby avoid travel time and expense.

[3] Although this matter unquestionably is important, it is not urgent. The shipments that are the subject of this dispute were received and temporarily stored before being transferred to the steel mill many years ago. CIS ceased operations in late 2008. The company now operating the facility has not purchased the products that are the subject of this dispute. Indeed, U.S. EPA issued its NOV to CIS in 2008, but then waited until 2010 to file its Complaint.

2. Depositions to Preserve Testimony Would Streamline the Hearing

In addition to the discovery Respondents seek from IFF, Respondents also request an order permitting the depositions of other third-party witnesses to record their testimony for the hearing, and providing for subpoenas to be issued for such depositions, if necessary. In addition to the IFF personnel, U.S. EPA and Respondents have identified seven fact witnesses who are neither employed by U.S. EPA nor by Respondents.[4] For the most part, these persons are brokers of bulk chemical materials who have knowledge of the markets for such materials and the sale or potential sale of such materials to CIS. One individual, Rick Murray, was the broker who sold the IFF products to CIS. The nature of the expected testimony of the broker witnesses appears to be in dispute. For example, U.S. EPA claims in its initial prehearing exchange that Ernie Willis "is expected to testify regarding the characterization of one of the hazardous waste streams treated and stored at the CIS facility" and "regarding the active involvement of Scott Forster in the handling of hazardous wastes[.]" (Complainant's Initial Prehearing Exchange, p. 7). Neither Mr. Willis nor his company, however, had any involvement in the sale of any of the materials that are the subject of the Complaint, and Respondents expect that he will testify that he also has no knowledge of the "active involvement" of Scott Forster in the handling of hazardous waste at CIS. (Respondents' Initial Joint Prehearing Exchange, p. 6).

These witnesses are not within the control of either U.S. EPA or Respondents. They work for unrelated companies. None live in Cleveland. There clearly is disagreement, and therefore some doubt, regarding whether they have relevant knowledge and how they would testify. They may be reluctant to provide testimony voluntarily. Under the circumstances, these

[4] These witnesses are Robert Gephart and Steven Gephart of Geptek, Inc., Ernie Willis, Troy Charpia and Russ Lloyd of Innovative Waste Management, Zygmunt Osiecki, of Neville Chemical Company, and Rick Murray of Aqua Fuels.

individuals should not be compelled to travel to Cleveland and remain for an undetermined period of time to provide testimony, the relevance of which has not been established, in connection with a dispute in which neither they nor their employers have any interest. It would minimize the inconvenience to these individuals and their employers, and would potentially significantly streamline the hearing, for the parties to take the depositions of these witnesses,[5] thereby enabling the parties to determine in advance of the hearing whether the witnesses have any relevant and probative testimony to offer, and if so, to preserve that testimony in a form that could then be stipulated to and/or could either be submitted in lieu of live testimony or presented in an appropriately edited (and presumably shortened) video format at the hearing.

3. The Sequencing of Deadlines in the Schedule Should be Revised

The schedule that has been set for the case contemplates that motions for accelerated decision be filed within very short time, followed by other prehearing motions such as motions *in limine* and motions to supplement, followed later by a joint set of stipulated facts, exhibits and testimony. If the requested third-party discovery is to be conducted, however, logically it should be completed first, before motions for accelerated decision, motions *in limine*, motions to supplement and the joint stipulations. Similarly, if the parties are permitted to depose the third-party witnesses to preserve their testimony, logically that also should be completed before the parties must finalize their motions for accelerated decision, motions *in limine*, motions to supplement and the joint stipulations. Furthermore, because exhibits and witnesses identified in supplemental exchanges could be the subject of a motion *in limine*, the deadline for motions *in limine* should follow the joint stipulations and any motions to supplement. Respondents request

[5] Video conferencing technology is widely available and easily arranged through most court reporters and can be used for depositions, enabling counsel to examine the deponent from a remote location if the U.S. EPA wishes to avoid travel expenses.

that a reasonable period of time be provided for third-party discovery of IFF and the depositions of third-party witnesses, that motions for accelerated decisions be due at the conclusion of such period, that motions to supplement and joint stipulations be due contemporaneously with final witness lists, and that motions *in limine* and other prehearing motions (such as for subpoenas, if necessary) be due along with prehearing briefs. Respondents request that the hearing be rescheduled to accommodate the parties' need to accomplish these prehearing matters. A proposed scheduling order is attached hereto as Exhibit A.

4. Bifurcation of the Hearing is Appropriate in this Case

Respondents request that the hearing be bifurcated and that a separate hearing be conducted on liability issues, followed, *if necessary*, by a separate hearing on penalty. U.S. EPA's hearing procedures contemplate bifurcated hearings, wherein liability is addressed first, and penalty second. 40 CFR 22.12(b) states "[t]he Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues." Severance, or bifurcation, of liability and penalty issues in administrative hearings is routinely done in Clean Air Act cases where it is specifically addressed in the rules. See, e.g., In the Matter of International Harvester Corp., No. CAA-120-V-84-1, 1987 WL 120038 (June 8, 1987).

In this matter, four of the nine expert witnesses have been identified as providing testimony related solely to penalty issues.[6] Most of the fact witnesses either are third-parties who should be deposed and whose testimony could easily be submitted in a pre-recorded form or

[6] Respondents' experts Joseph Prementine, Keith Klodnick, and Chris McClure, and U.S. EPA's expert Gale Coad, all have been identified as experts on penalty issues.

presented at either hearing, or would be expected to be present at both hearings anyway.[7] Even presuming some overlap of witnesses, bifurcation of the hearing (presently scheduled for three full weeks) would alleviate the need for all persons involved to undertake an extended stay away from their homes and offices, and would enable all persons involved to more precisely predict and plan for their travel and avoid unnecessary hotel nights. Thus, bifurcation would lead to a more efficient use of resources for all involved. Moreover, at the telephonic preliminary prehearing conference on December 7, 2011, while there was some suggestion that it would not be feasible to reschedule a three-week hearing within the next six months, it may be possible to schedule two shorter hearings (again, presupposing a second hearing on penalty is necessary) without extending the overall case schedule beyond the 90-day extension requested by Respondents.

In addition, during the telephonic status conference on December 6, 2011, for the first time, counsel for U.S EPA indicated that U.S. EPA intended to move to supplement its prehearing exchange in order to submit revised penalty calculations. The information adduced at the liability hearing may well require additional revisions to the parties' penalty calculations.

5. An Expedited Ruling on this Motion is Warranted

Respondents request an expedited ruling on this motion. Although U.S. EPA has fifteen days to file its opposition, if any, at the December 6, 2011 telephonic preliminary prehearing conference, counsel for U.S. EPA represented that U.S. EPA could respond "within a few days." Given the looming December 19, 2011 deadline for motions for accelerated decision, and the upcoming holidays, Respondents respectfully request an expedited ruling on this motion.

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[7] Respondents Scott Forster and Eric Lofquist, and U.S. EPA's representative Mike Beedle would be present for the entirety of the hearings in any event.

CONCLUSION

For all of these reasons, Respondents request that its motion for leave to take discovery and to take depositions be granted, that the schedule for this administrative proceeding be extended by approximately ninety (90) days, that deadlines be established for motions for accelerated decision, for prehearing motions, for filing a Joint Set of Stipulated Facts, Exhibits and Testimony, and that the hearing be bifurcated and rescheduled, all as set forth in Respondents' proposed scheduling order attached hereto as Exhibit A.

Respectfully submitted,

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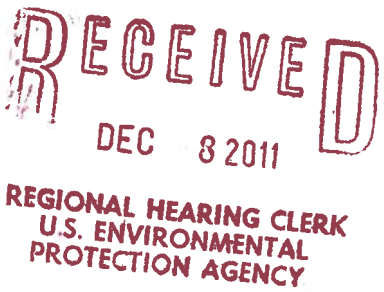
Attorneys for Respondents Carbon Injection Systems LLC, Eric Lofquist and Scott Forster

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

CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that the foregoing Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's Motion for A Revised Case Schedule and Renewed Motion for Third-party Discovery was sent on December 8, 2011, in the manner indicated, to the following:

Original and One Copy by hand delivery to:



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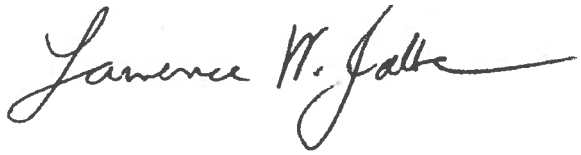

Lawrence W. Falbe

EXHIBIT A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

[PROPOSED] DISCOVERY AND SCHEDULING ORDER

Upon consideration of Respondents' motion for a revised scheduling order and renewed motion for third-party discovery, and joint motion for administrative subpoenas to issue for the discovery of third-party witnesses, and Complainant's response to such motion, the deadlines set forth in the August 5, 2011 Prehearing Order and Order on Respondents' Motion for Administrative Subpoena, August 15, 2011 Order on Joint Motion for Stay of Proceedings, and November 28, 2011 Order Scheduling Hearing are vacated.

1. The parties shall be permitted to take the discovery depositions of the current or former employees of IFF who have been identified as witnesses by U.S. EPA and Respondents, specifically Tom Guido, Teresa Barry, Donald DuRivage and David Shephard. Respondents' motion for administrative subpoenas to issue for such depositions is granted. If the parties are not able to secure the attendance of any such witnesses voluntarily, an administrative subpoena will be issued at the request of either party.

2. The parties are permitted to take the depositions of any third-party fact witness and to record their testimony on direct and cross examination to be submitted in lieu of live testimony or presented in video format at the hearing. If the parties are not able to secure the attendance of any such witnesses voluntarily, an administrative subpoena will be issued at the request of either party. The parties shall attempt in good faith to stipulate to such testimony and submit it in lieu of live testimony at a hearing.

3. The parties shall have until February 28, 2012 to complete all depositions.

4. The deadline for filing motions for accelerated decision is March 13, 2012.

5. The deadline for filing motions to supplement the parties' prehearing exchanges, final list of witnesses that will be called live at the hearing, and for filing a Joint Set of Stipulated Facts, Exhibits and Testimony, is April 17, 2012.

6. The deadline for filing motions *in limine* and for prehearing briefs is May 1, 2012.

7. The hearing in this matter on liability will commence on May 21, 2012.

8. The hearing in this matter on penalty, if necessary, will commence on June 18, 2012.

All other provisions of the August 5, 2011 Prehearing Order and Order on Respondents' Motion for Administrative Subpoena, August 15, 2011 Order on Joint Motion for Stay of Proceedings, and November 28, 2011 Order Scheduling Hearing not inconsistent with this scheduling order remain in effect.

_____
Susan L. Biro
Chief Administrative Law Judge

Dated: _____, 2011