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

# FILE COPY

REPLY TO THE ATTENTION OF:

C-14J

May 4, 2012

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

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

Dear Judge Biro:

Enclosed find a copy of "COMPLAINANT'S MOTION *IN LIMINE* TO PRECUDE CERTAIN TESTIMONY, EVIDENCE, AND DOCUMENTS" that was filed today in the above-referenced matter.

Very truly yours,

Jeffrey A. Cahn
Associate Regional Counsel

cc: Regional Hearing Clerk (w/ encl.)
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**In the Matter of Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist**
**Docket No. RCRA-05-2011-0009**

Copy via Pouch Mail to:

Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

5/4/2012
Date

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 5**

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



**COMPLAINANT'S MOTION *IN LIMINE* TO PRECUDE CERTAIN TESTIMONY, EVIDENCE, AND DOCUMENTS**

Complainant, the United States Environmental Protection Agency, Region 5 (Complainant or the Region), pursuant to Rules 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 moves for an order *In Limine* to Preclude Duplicative Testimony and to Exclude Certain Documents. As discussed below, Respondents have identified two expert witnesses that are being offered to testify on exactly the same subject, as demonstrated by the description of their testimony in the prehearing exchanges and by their own reports and affidavits. Consistent with the Rules, Complainant respectfully requests an order *in limine* barring one of these witnesses from testifying at all or, alternatively, from providing duplicative testimony. Complainant also respectfully requests an order *in limine* barring presentation of testimony and evidence regarding the ability of Mr. Forster and Mr. Lofquit to pay the proposed penalty. Finally, Respondents have identified a number of exhibits that cannot meet the evidentiary standard for admissibility. Complainant respectfully requests an order *in limine* barring the use of the exhibits at trial as warranted under the Rules.

Respondents do not agree to this motion.

## I. Discussion

Pursuant to Rule 22.19(a) of the Consolidated Rules, the August 5, 2011 Prehearing Order and the August 15, 2011 Order on Joint Motion for Stay of Proceedings in this matter, Respondents filed an Initial Joint Prehearing Exchange on November 3, 2011, and a First Supplemental Prehearing Exchange on April 23, 2012. 40 C.F.R. § 22.19(a). Pursuant to Rule 22.19(a)(2) of the Consolidated rules, each party is required to include in its prehearing exchange "The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony...." 40 C.F.R. § 22.19(a)(2). In addition, Rule 22.22(a)(1) provides that all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value shall be admitted by the Court. 40 C.F.R. § 22.19(a)(2). A Presiding Officer may exclude evidence that is "clearly inadmissible for any purpose." *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, *22 (June 2, 2011).

### A. Respondents Would Like to Offer Duplicative Testimony Through Two of Their Experts

Respondents have identified two expert witnesses that are being offered to provide the exact same testimony, as demonstrated by the description of their testimonies in the prehearing exchanges and by their own reports and affidavits. Consistent with the Rules, an order barring one of these witnesses from testifying at all or, alternatively, from providing duplicative testimonies, is appropriate.

In Respondents' Initial Joint Prehearing Exchange, Respondents identify two experts on the subject of blast furnace operations, Dr. Joseph J. Poveromo and Mr. Frederick Rorick. [Attachment "A" at 7-9.] The narrative summary for Dr. Poveromo states that he "will testify regarding the utilization of various liquid carbon and hydrocarbon raw materials for iron ore

reduction in a blast furnace for making iron." [Attachment "A" at 8.] The narrative statement for Mr. Rorick states that he "will testify regarding blast furnace operations, and the utilization of liquid carbon and hydrocarbon raw materials for iron ore reduction." [Attachment "A" at 9.] These descriptions are virtually identical and indicate that there will be duplicative testimonies offered by the Respondents at hearing.

The fact that these two "experts" are being offered to provide duplicative, cumulative testimony on the same subject of blast furnace operations is further confirmed by reading Mr. Rorick's expert report [Attachment "B"] and his declaration [Attachment "C"], and comparing the information contained in those two items to the information contained in Dr. Poveromo's declaration [Attachment "D"]. Looking at the two declarations is particularly instructive. The first topic that Mr. Rorick discusses in his declaration is titled "The Use of the Terms 'Fuel' and 'Fuel Injection [sic] are Misonomers." [Attachment "C" at 2.] Dr. Proveromo identifies as the second topic for discussion in his declaration "The Use of the Terms 'Fuel' and 'Fuel Injection [sic] are Misleading." [Attachment "D" at 9.] The second topic that Mr. Rorick discusses in his declaration is titled "Injectants are not Burned for Energy Recovery in a Blast Furnace." [Attachment "C" at 3.] Dr. Proveromo identifies as the first topic for discussion in his declaration "Injectants are not Burned for Energy Recovery in a Blast Furnace." [Attachment "D" at 3.] Finally, the third topic that Mr. Rorick discusses in his declaration is titled "Injectants are a Source of Carbon in Hot Metal Produced in a Blast Furnace." [Attachment "C" at 5.] Mr. Proveromo identifies as the third topic for discussion in his declaration "Injectants are a Source of Carbon in Hot Metal Produced in a Blast Furnace." [Attachment "D" at 9.] In keeping with the identical titles (except for one title using the word "misnomer" and the other title the word

"misleading"), the substantive portions of the declarations of Mr. Rorick and Dr. Poveromo cover the same ground.

Issuing an order *in limine* barring one of these witnesses from testifying, or at a minimum barring their testimony on identical topics, is consistent with the Rules, which provide that all evidence which is not unduly repetitious or of little probative value shall be admitted by the Court. Here, the testimony that each of these two experts would offer are unduly repetitious and, therefore, lack probative value. If allowed, the only probative value added from essentially identical testimonies is the weight provided by their duplication – essentially a hope that if you repeat something often enough, it will be taken as true.

It is important to distinguish the testimonies at issue from the testimonies of two fact witnesses that concern the same subject matter. Two fact witnesses can provide varying and independently informative perspectives as to the same event. Conversely, an additional expert, who has reviewed the same documents and reached the same conclusions as the first expert, contributes only the added weight of his technical degree. Further, because each expert has submitted declarations exemplifying the duplicative nature of their testimonies, there is no reason to wait until hearing to decide if the testimonies are, in fact, duplicative - we already know.

Allowing presentation of duplicative expert testimony as offered in this case is, at best, inefficient and, at worst, an unfair "piling on" by allowing the trial record to be loaded with the weight of duplicative testimony. Accordingly, the Court should bar the testimony of one of these two expert witnesses. Alternatively, this Court should issue an order *in limine* directing that the testimony of these two witnesses not retread the same ground at trial.

### B. An Order *In Limine* Should Issue to Bar Introduction of Evidence Regarding the Ability of Mr. Forster and Mr. Lofquist to Pay the Proposed Penalty

To date, Respondents Mr. Forster and Mr. Lofquist have not provided any documents disputing their ability to pay the proposed penalty. To date, Respondents Mr. Forster and Mr. Lofquist also have not identified anyone as providing testimony disputing their ability to pay the proposed penalty. Finally, on February 14, 2012, the Presiding Officer in this case noted that "Respondents have stated no evidence regarding the ability to pay of Scott Forster and Eric Lofquist will be presented at hearing, thereby waiving the Sixth Affirmative Defense in relation to those Respondents." Order of February 12, 2012 at 12. Accordingly, the Presiding Officer struck the affirmative defense of inability to pay the proposed penalty as to Mr. Forster and Mr. Lofquist. Based on these facts, an order *in limine* should issue to bar introduction at trial of testimony and evidence regarding the ability of Mr. Forster and Mr. Lofquist to pay the proposed penalty. Such an order would protect Complainant from prejudice arising from surprise at hearing.

### C. An Order *In Limine* Should Issue to Bar Introduction of Inadmissible Documents at Hearing.

In their November 3, 2011 Initial Joint Prehearing Exchange, Respondents list several exhibits that should be excluded from hearing, because they are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. A Presiding Officer may exclude evidence that is "clearly inadmissible for any purpose." *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, *22 (June 2, 2011). In Respondents' Initial Joint Prehearing Exchange, RX19, 20, 24, 25, 26, 27, 28, 30 and 32 are inadmissible for any purpose. Each document at issue is inadmissible for the following reasons:

1. RX19 and RX20

RX 19 and RX20 are comprised of information from thirteen invoices from CIS suppliers. The invoices include the price that CIS paid for material on those thirteen instances only. The documents of RX19 and RX20 are immaterial and unreliable because they represent invoices that Respondents hand-picked from thousands. Because the record clearly demonstrates that the price of materials, such as Unitene LE and Unitene AGR, varied, *see* RX99 at CIS01721-01895; CX9 at EPA7232-7237, this small subset of invoices is not representative of the prices that CIS paid throughout the time period of the violations at issue. Therefore, RX19 and RX20 are inadmissible.[1]

2. RX24, 25, 26, 27, 28, and 30

RX 24, 25, 26, 27, 28, and 30 are documents related to materials that are not at issue in this case. RX24, 25, 26, and 27 are documents containing trademark information and Material Safety Data Sheets for a material called Sylvablend. RX28 is a document containing trademark information for a material called Rosintene. In no way does the protection of the Sylvablend or

[1] EPA does not know whether the invoices contained in RX99 represent all of invoices documenting the shipment of Unitene from IFF to CIS. Should this Court find that RX19 and RX20 are admissible, EPA requests that this Court order Respondents to introduce the remainder of the CIS invoices. Pursuant to Federal Rule of Evidence (FRE) 106, a judge, upon complaint that admission of a portion of a document or a single document will be prejudicial, may require introduction of the entire document or related documents. Because RX19 and RX20 do not provide the price of material throughout the period of violation, it is prejudicial to force EPA to rely on partial information. Therefore, an order requiring Respondents to produce the remainder of the invoices is appropriate.

Rosintene name relate to whether Unitene is a solid waste; therefore, trademark information regarding Sylvablend and Rosintene (RX24 and RX28) are irrelevant and inadmissible. Additionally, the Material Data Safety Sheets for Sylvablend (RX25, 26, and 27) are irrelevant and immaterial considering that this Court is already in possession of the Material Data Safety Sheets of the materials at issue – Unitene LE and AGR. Finally, RX30 is a chart of trademarked products that are allegedly similar to IFF's Unitene product. This document is of little persuasive value when Respondents can move to admit trademark information for Unitene itself. The trademark information of unrelated products is irrelevant. Therefore RX24, 25, 26, 27, 28, and 30 should be excluded from introduction at hearing.

3. RX32

RX32 contains Wikipedia articles regarding limonene and terpene. As described by the Wikipedia website itself, "Wikipedia is written collaboratively by largely anonymous Internet volunteers who write without pay. Anyone with Internet access can write and make changes to Wikipedia articles." Wikipedia: About, http://en.wikipedia.org/wiki/Wikipedia:About. Because even Respondents could edit or compose the very articles that they attempt to rely on, Wikipedia is a completely unreliable source of evidence in any legal proceeding. Accordingly, RX32 is unreliable and inadmissible.

## II. CONCLUSION

WHEREFORE, consistent with the Rules, Complainant respectfully requests an order *in limine* barring one of these witnesses from testifying at all, or alternatively from providing duplicative testimony; Complainant respectfully requests an order *in limine* barring presentation of testimony and evidence regarding the ability of Mr. Forster and Mr. Lofquit to pay the proposed penalty; and Complainant further respectfully requests an order *in limine* barring the use of the identified exhibits at trial.

Respectfully Submitted,

Counsel for EPA:

5/4/2012
Date

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**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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

## CERTIFICATE OF SERVICE

I certify that I caused the accompanying "COMPLAINANT'S MOTION *IN LIMINE* TO PRECUDE CERTAIN TESTIMONY, EVIDENCE, AND DOCUMENTS", dated May 4, 2012, to be 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 Regular Mail to:

Attorneys for Respondents:

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