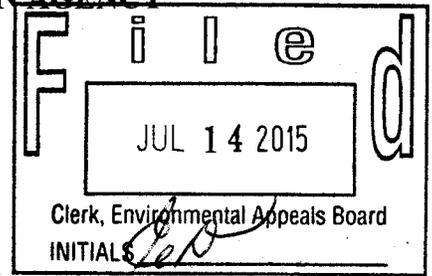


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC**



_____)
In re:)
)
Carbon Injection Systems, LLC,)
Scott Forster, and Eric Lofquist)
)
Docket No. RCRA-05-2011-0009)
_____)

RCRA Appeal No. 15-01

ORDER IDENTIFYING ISSUES TO BE BRIEFED

This case involves an enforcement proceeding by the U.S. Environmental Protection Agency’s Region 5 (“Region 5”) against Carbon Injection Systems, Scott Forster, and Eric Lofquist (“Carbon Injection Systems”) for, among other things, the alleged storage and treatment of hazardous waste without a permit in violation of section 3005 of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6925, and sections 3745-50-40 to 3745-50-66 of the Ohio Administrative Code (“OAC”). The charges arise from Carbon Injection Systems’ distribution of certain hydrocarbon materials to WCI Steel, Inc. for use in WCI Steel’s iron blast furnace. On March 17, 2015, Chief Administrative Law Judge Susan Biro (“ALJ”) dismissed the case ruling that the hydrocarbon materials were not a “waste” under OAC 3745-51-02, and thus not within the jurisdiction of RCRA and OAC. Initial Decision at 91. Specifically, the ALJ held that the hydrocarbon materials were not within the category of recycled materials that qualify as a OAC “waste” because Region 5 had not shown that the hydrocarbon materials were “burned for energy recovery” in the blast furnace. *Id.* at 83; *see* OAC § 3745-51-02(E)(2)(b).

After reviewing the ALJ's decision, the Environmental Appeals Board issued an order exercising *sua sponte* review. *In re Carbon Injection Systems, LLC, et al.*, RCRA Appeal No. 15-01 (EAB May 18, 2015) (Order Electing to Exercise *Sua Sponte* Review); see 40 C.F.R. §§ 22.27(c)(4), .30(b). In today's order, we delineate the issues for briefing on review, set a briefing schedule for the parties, and direct how the parties are to manage the filing of any confidential business information with the Board.

Both parties are directed to submit briefs to the Board that respond to the following questions:

- 1) Does the phrase "burned for energy recovery" include materials burned to recover chemical energy?
- 2) Did EPA, prior to initiating this enforcement proceeding, provide notice of its interpretation that the phrase "burned for energy recovery" extends to burning for the recovery of chemical energy?
- 3) If not, was it appropriate for Region 5 to rely on this interpretation in seeking civil penalties for past behavior?
- 4) Did the hydrocarbon materials distributed by Carbon Injection Systems to WCI Steel, Inc., supply substantial, useful heat energy upon combustion in the raceway of WCI Steel's iron blast furnace? Specifically, the Board requests that you address the ALJ's determination that the hydrocarbon materials supplied by Carbon Injection Systems did not contribute substantial, useful energy to the WCI Steel iron blast furnace "because of their net consumption of energy and consequential cooling effect in the raceway." Initial Decision at 83.

5) Which party bears the burden of proof on the various issues raised in the case? In particular, explain whether you agree or disagree with the ALJ's discussion of the burden of proof in footnotes 29 and 30 of the Initial Decision. See Initial Decision at 48 mn.29-30.

Opening briefs from both Region 5 and Carbon Injection Systems shall be due on August 18, 2015. Both parties may file response briefs if they choose. Response briefs shall be due on September 14, 2015. Opening briefs shall not exceed 14,000 words and response briefs shall not exceed 7,000 words. Region 5 and Carbon Injection Systems shall serve a copy of any brief filed with the Board on the opposing party. The Board further directs that Region 5 shall consult with EPA's Office of Solid Waste and Emergency Response and EPA's Office of General Counsel in preparing its brief(s).

In addition, the ALJ issued a protective order regarding various documents that the parties stipulated may contain confidential business information. *In re Carbon Injection Systems, LLC, et al.*, Docket No. RCRA-05-2011-0009 (ALJ Oct. 26, 2011) (Order on Joint Motion for Entry of Stipulation and Protective Order Regarding Confidentiality). The Board's preliminary judgment is that the alleged confidential business information does not pertain to the issues the Board has delineated for *sua sponte* review. Accordingly, to facilitate the Board's review of this matter, we direct that the parties:

- 1) Do not refer to or disclose any claimed confidential business information in the briefs filed upon *sua sponte* review;
- 2) In citing to the proceedings before the ALJ, cite only to non-confidential materials or materials from which all confidential business information has been redacted (to the

extent a newly redacted document is created for *sua sponte* review, it shall be submitted with the first brief that cites to it);

3) Confer and provide the Board by August 18, 2015 with a copies of the respective testimonies of Dr. Richard J. Fruehan, Dr. Joseph J. Poveromo, and Mr. Frederick Rorick, Jr., from which all confidential business information has been redacted;

4) Confer and provide the Board by August 18, 2015, with copies of CX 24 and RX 108 from which all confidential business information has been redacted.

Should any party conclude that reference to alleged confidential business information is material to its argument, that party should file a motion with the Board as expeditiously as possible requesting the Board to modify this Order. To the extent the Board identifies further material that it would like to review in redacted form, we will notify the parties by order.

The Board will decide whether to hold oral argument on this matter following its review of all briefs. Should the Board decide that oral argument will help it in its deliberations, it will notify the parties by order.

So ordered.

Dated: *July 14, 2015*

ENVIRONMENTAL APPEALS BOARD

By: *Leslye M. Fraser*
Leslye M. Fraser
Environmental Appeals Board

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Identifying Issues To Be Briefed** in the matter of Carbon Injection Systems, LLC, Scott Forster, and Eric Lofquist, RCRA Appeal No. 15-01 were sent to the following persons in the manner indicated:

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Dated: *July 14, 2015*

Annette Duncan
Annette Duncan
Secretary