

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

**In the Matter of:**

**Carbon Injection Systems LLC,  
Scott Forster,  
and Eric Lofquist.**

**Docket No. RCRA-05-2011-0009**

**MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW**

The United States Environmental Protection Agency, Region 5 (“EPA” or “Agency”) hereby files this Motion for Extension of Time to File Petition for Review (“Motion”).

The hearing in this matter was held June 18-29, 2012 (in Cleveland, Ohio) and July 16, 2012 (in Augusta, Georgia). On March 17, 2015, Chief Administrative Law Judge (“ALJ”) Biro issued an “Order Regarding Redactions From Initial Decision on the Basis of CBI”<sup>1</sup> and an “Initial Decision” in this matter. The “Initial Decision” released on March 17, 2015, was signed by Chief ALJ Biro and each page was emblazoned with this watermark: “CONFIDENTIAL – CBI PROTECTED.” The “Order Regarding Redactions From Initial Decision on the Basis of CBI” states that “[t]he filing of any motion requesting redaction does not effect [sic] the finality of the order or the deadlines for appeal therefrom.” On March 24, 2015, EPA filed “Complainant’s First Status Report” informing Chief ALJ Biro that counsel for EPA and counsel for Respondents conferred and agreed that the Initial Decision does not contain confidential business information (“CBI”). Neither party filed a motion requesting redactions of CBI from

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<sup>1</sup> It should be noted that the majority of the CBI in this matter is information generated by non-parties.

the Initial Decision. A non-watermarked Initial Decision was first observed by counsel for EPA on the Office of Administrative Law Judges website on April 6, 2015.

The deadline for filing a petition is “[w]ithin 30 days after the initial decision is served.” 40 C.F.R. § 22.30(a). In this case, the watermarked Initial Decision was served via certified mail (return receipt) and e-mail. The email version of the watermarked Initial Decision was received by EPA on March 17, 2015, and the certified mail (return receipt) version of the watermarked Initial Decision was received by EPA on March 23, 2015. On November 21, 2013, Chief ALJ Biro issued a “Standing Order Authorizing Filing and Service By E-mail in Proceedings Before the Office of Administrative Law Judges” (“Standing Order”) (Attachment A). The Standing Order authorizes the filing and service of documents by e-mail, “other than the complaint, rulings, order, and decisions.” Standing Order at 1. Therefore, the filing deadline for a petition in this matter is thirty days from March 23, 2015, or, April 22, 2015. EPA hereby requests an extension from this April 22, 2015, deadline to May 21, 2015 (forty-five calendar days after the date a non-confidential Initial Decision in this matter was issued by Chief ALJ Biro).

Under the Environmental Appeals Board (“Board”) procedural rules, motions for extensions of time must be filed “sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time,” and to provide the Board with a reasonable opportunity to prepare an order. 40 C.F.R. § 22.7(b). This motion is being filed well in advance of the due date for the petition in this matter.

Available case law indicates that the Board has discretion to relax or modify its procedural rules. *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970). (“[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the

ends of justice require it.”); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 139 & n.36 (EAB 2006) (explaining the Board’s decision to grant petitioners’ motion to amend their petition for review of a PSD permit because it caused no discernable prejudice to permittee, the amended petition was filed before any responsive pleadings, and the issue raised involved important policy considerations); *In re Footprint Power*, PSD Appeal No. 14-02 (Order Granting Motion for Extension of Time to File Petition for Review dated March 6, 2014, where Board extended deadline for filing of amended petition for review of a PSD permit after petitioners were without counsel for a crucial period and petitioners were required to digest and address a complex administrative record)(Attachment B); *In re Ms. Dessie Brumfield*, TSCA Appeal No. 13-(04) (December 20, 2013 Order in which Board granted a motion for extension of time for EPA to file a notice of appeal and brief due in part to the need for the regional office to coordinate with EPA headquarters offices on potentially nationally-significant issues and the fact that lead counsel for EPA was to be out of the office for a significant period) (Attachment C); *In re City of Homedale*, NPDES Appeal No. 13-10 (Order Granting Region 10’s Motion for Extension of Time dated October 30, 2013, where Board extended filing deadline for a response to a petition related to an NPDES permit due to a partial government shutdown due to a lapse in appropriations)(Attachment D); *In re Circle T Feedlot, Inc.*, 14 E.A.D. 653, (Order Denying Review dated June 7, 2010 where Board determined that petitions for review in a permitting matter should not be dismissed because they were untimely filed since there was a lengthy delay between the postmark date of the petition and the Board’s receipt of the petitions since the petitions were delayed at a post office anthrax decontamination center). EPA can show good cause to relax the petition deadline in this case.

First, the decision regarding whether or not to appeal must be coordinated at many levels within EPA – both within the regional office and at EPA headquarters offices. This is of particular concern in this matter, which EPA considers to involve potentially nationally-significant issues. Until April 6, 2015, the EPA case team only had a watermarked Initial Decision marked “CONFIDENTIAL – CBI PROTECTED.” Although on March 24, 2015, the parties informed Chief ALJ Biro of their belief that the Initial Decision did not contain CBI, Chief ALJ Biro nonetheless may have decided to redact any public version of the Initial Decision. In order to best protect CBI and lower the risk of an accidental release of CBI, the EPA case team waited until a public version of the Initial Decision was available to disseminate among numerous EPA employees – rather than disseminating the watermarked Initial Decision marked “CONFIDENTIAL – CBI PROTECTED”. This precaution has hindered decision making by EPA regarding whether or not to appeal. Second, the Initial Decision is 95 pages in length and was issued over 2-1/2 years after the hearing concluded and over 2 years from the filing of the last post-hearing brief in the matter. EPA is required to digest and address a complex and lengthy decision and the Agency requires additional time to ensure a complete notice of appeal and accompanying appellate brief. Third, the lead counsel for EPA has long-scheduled vacation plans for April 10-18, 2015. Finally, at the time this case was heard in June and July of 2012 by Chief ALJ Biro (and during post-hearing briefing in late 2012 and early 2013), EPA was represented by three staff attorneys. Now, one of the three (Moore) has left the Agency, leaving only two (Garypie and Cahn) staff attorneys to handle the complex analysis required by this Initial Decision.

EPA contacted counsel for Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist, and those parties agree with an extension to May 6, 2015 (thirty calendar days after the

date a non-confidential Initial Decision in this matter was issued by Chief ALJ Biro), but not to May 21, 2015.

It is for these reasons that EPA hereby requests that the April 22, 2015 petition filing deadline be extended to May 21, 2015 (forty-five calendar days after the date a non-confidential Initial Decision in this matter was issued by Chief ALJ Biro).

Respectfully Submitted,

Counsel for EPA:

3/8/15

Date



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## ATTACHMENTS

A - Standing Order Authorizing Filing and Service By E-mail in Proceedings Before the Office of Administrative Law Judges (November 21, 2013)

B - *In re Footprint Power*, PSD Appeal No. 14-02 (March 6, 2014)

C- *In re Ms. Dessie Brumfield*, TSCA Appeal No. 13-(04) (December 20, 2013)

D - *In re City of Homedale*, NPDES Appeal No. 13-10 (October 30, 2013)

**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 "Motion for Extension of Time to File Petition for Review", dated April 8, 2015, was sent this day in the following manner to the addressees listed below:

**An electronic filing was made to:**

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
WJC East, Room 3332  
Washington, DC 20004

**Copy via hand-delivery 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

4/8/2015  
Date

  
Elizabeth Rosado, Administrative Assistant