



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

RECEIVED JUN 15 2012 REGIONAL HEARING CLERK U.S. ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: )
Carbon Injection Systems LLC, )
Scott Forster, )
and Eric Lofquist, )
Respondents. )

Docket No. RCRA-05-2011-0009

ORDER ON RESPONDENTS' MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL JOINT PREHEARING EXCHANGE

The hearing in this matter is scheduled to commence on Monday, June 18, 2012. On June 5, 2012, Respondents filed a Motion for Leave to File Second Supplemental Prehearing Exchange ("Motion" or "Mot.") in which Respondents seek leave to supplement their prehearing information with a corrected exhibit (RX 21) and an additional proposed exhibit (RX 120). Complainant filed a Response to Respondents' Motion for Leave to File Their Second Supplemental Joint Prehearing Exchange ("Response" or "Resp.") on June 6, 2012. Recognizing that the reply briefs had been suspended by earlier order in the context of previous prehearing filings, Respondents filed a Motion for Leave to File Reply to Complainant's Response to Respondents' Motion for Leave to File Their Second Supplemental Prehearing Exchange ("Motion to Reply") on June 7, 2012. The Motion to Reply was accompanied by Respondents' Reply to Complainant's Response to Repondents' Motion for Leave to File Their Second Supplemental Joint Prehearing Exchange ("Reply"). Included in the Reply were the three additional proposed exhibits discussed above in note 2.

1 The title of Respondents' Motion states that it is the first supplemental prehearing exchange, however the text of the Motion more accurately reflects that this is the second time Respondents have sought leave to supplement their prehearing exchange, the first being filed April 23, 2012.

2 Respondents' Motion identifies only one newly proposed exhibit as RX 116, but in its Reply Respondents seek to add three other exhibits, identified as RX 117 - 120. By electronic notice received by this Tribunal on June 11, 2012, Respondents correct the numbering of these proposed exhibits from RX 116 - 120 to RX 120 - 124 to account for the preexistence of RX 116 - 120, which were added to Respondents' prehearing exchange on May 18, 2012. This Order will refer to the proposed exhibits by their corrected numbers (RX 120 - 124).

## I. Arguments of the Parties

Respondents argue that RX 21 must be replaced in order to correct a clerical error that resulted a duplicate page and corresponding omission. Mot. at 2. Complainant does not object to this “clerical remedy.” Resp. at 2. With respect to RX 116, and 120 - 124, Respondents state that in reviewing RX 21 they determined that additional invoices “should have been included.” Specifically, Respondents argue that they previously included invoices for 2006, 2007, and 2008, in their prehearing exchange because these documents were initially gathered to supply “financial information to U.S. EPA for a three-year period in connection with the parties’ discussions” and that only in assembling exhibits for hearing did Respondents determine that the information did not go back to 2005. Reply at 1. Respondents now seek to have those 2005 invoices added to their prehearing exchange. Respondents note that Rule 22.19(f) requires a parties to supplement a prior prehearing exchange when it learns that the information provided is “incomplete, inaccurate or outdated, and additional or corrective information has not otherwise been disclosed” properly. Mot. at 2 (quoting 40 C.F.R. § 22.19(f)). Respondents acknowledge that the Motion is being submitted fewer than 15 days before the hearing, but argue that Complainant should have sufficient time to review the new information, that the Motion is not in bad faith, and Complainant will not suffer any prejudice if the Motion is granted. Mot. at 3.

In its Response, Complainant argues that Respondents mistake the standard under which this Motion must be evaluated. Recognizing that Rule 22.19(f) governs motions to supplement the prehearing exchange generally, Complainant notes that Rule 22.22(a)(1) applies to motions filed within 15 days of the hearing. Resp. at 2 (citing 40 C.F.R. § 22.22(a)(1)). Rule 22.22(a)(1) specifically provides that if a party fails to provide an exhibit to all parties at least 15 days before the hearing date, the Administrative Law Judge “shall not admit the document . . . unless the non-exchanging party had good cause for failing to exchange” the information “as soon as it had control of the information, or had good cause for not doing so.” 40 C.F.R. § 22.22(a)(1). Complainant argues that Respondents have not attempted to show good cause for failing to exchange the require information and, thus, the Motion should be denied. Resp. at 2.

Complainant also submits that Respondents could not show good cause, even if they had tried, because the documents at issue were “allegedly created approximately six years ago and maintained within Respondents’ control during the entire course of this proceeding. In fact, Complainant explicitly sought the documents at issue in EPA’s February 8, 2010 Request for Information . . . .” Resp. at 2-3 (citing CX 1 at EPA 023). Moreover, Complainant argues, Respondents’ response to the information request indicated that responsive documents, in the form of invoices, were known and would be produced upon request. Resp. at 3 (quoting CX 2 at EPA 061).

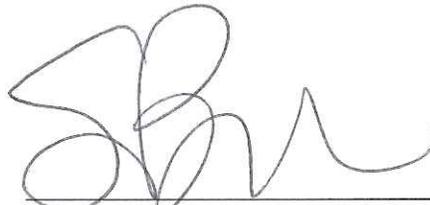
Finally, Complainant raises a concern related to the authenticity of the proposed exhibits, noting that the invoices in RX 120 cover sales that occurred in 2005 but identify an entity, Severstal Warren, Inc., that did not purchase the WCI Steel facility until May 16, 2008. Resp. at 3.

In their Reply, Respondents address Complainant's concern regarding authenticity by offering an explanation of the financial accounting software "QuickBooks," which uses dynamic data fields for capturing vendor and customer information which, if changed subsequently, will display the more recent information even if earlier invoices tied to that successor company are generated from the software's reporting feature. Reply at 2. Respondents note that, irrespective of vendor information, once the books are closed in an account in QuickBooks, the financial information cannot be altered. *Id.* However, "in the interest of addressing Complainant's concern over the authenticity of the information," Respondents include with the Reply RX 121 - 124, which are "the 'original' invoices," in order to replace RX 21 - 23 and RX 120. *Id.*

## II. Discussion and Conclusion

When a party fails to exchange prehearing information properly at least 15 days before the hearing date, it must show good cause for its failure before the Administrative Law Judge may admit the information. Here, Respondents have not made any attempt to show good cause why they did not disclose the 2005 invoices prior to June 5, 2012. It is undisputed that the documents at issue were in Respondents' possession, would have been responsive to the February 2010 Request for Information, and could have been provided as part of Respondents' first supplemental prehearing exchange. Resp. at 2-3; Reply at 1-2. Because Respondents had ample opportunity to furnish a complete picture of the CIS invoices and because they have not shown good cause why they failed to provide the information as soon as they had control of it, the Motion is **DENIED**.

**SO ORDERED.**



Susan L. Biro  
Chief Administrative Law Judge

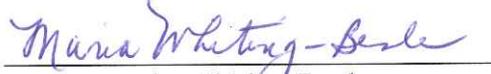
Dated: June 12, 2012  
Washington, D.C.



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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion For Leave To File Second Supplemental Joint Prehearing Exchange**, dated June 12, 2012, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale  
Staff Assistant

Dated: June 12, 2012

Original and One Copy By Regular To:

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Regional Hearing Clerk  
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JUN 15 2012

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