

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)
)
Carbon Injection Systems, LLC,)
Scott Forster,)
Eric Lofquist,)
)
Respondents.)
)

Docket No. RCRA-05-2011-0009

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**COMPLAINANT’S MOTION FOR LEAVE TO FILE ITS FIRST SUPPLEMENTAL
PREHEARING EXCHANGE**

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant or the Region), by and through its counsel, pursuant to Rules 22.16 and 22.19(f) 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 files its Motion for Leave to File Its First Supplemental Prehearing Exchange. Respondent does not agree with this motion. In support of this Motion, Complainant states as follows:

I. Background

Complainant seeks to file its First Supplemental Prehearing Exchange, which will contain the following:

A. Amended Witness Descriptions

EPA is submitting amended witness descriptions for two expert witnesses: Gail Coad and Francis Awanya. While continuing to prepare its case, Complainant has concluded that a significant portion of the testimony of these two witnesses will include two topics not described in Complainant’s Initial Prehearing Exchange. For Coad, EPA now expects significant

testimony regarding economic benefit. For Awanya, EPA now expects significant testimony regarding analysis for carbon content. The amended witness descriptions will reflect these expectations.

B. Additional Witnesses

EPA is submitting the name of an additional expert witness, David Clark. Mr. Clark is expected to testify regarding chemical processing at the IFF Augusta plant. After depositions were held in this matter on January 31 and February 1 and 22, 2012, EPA determined that expert witness testimony on this topic would be necessary to submit as part of its case-in-chief.

C. Additional Exhibits

Complainant is adding a number of documents as exhibits for various reasons. CX160 is a portion of the Ohio RCRA regulation. Complainant submitted the state RCRA regulations in Complainant's Rebuttal Prehearing Exchange (Exhibits CX116-123) as part of an effort to assist the Court because the regulations are arguably cumbersome to access and print from computers. *See* EPA Office of Administrative Law Judges Practice Manual at 19 (July 2011). CX160 was inadvertently omitted from Complainant's Initial Prehearing Exchange. CX161 is a revised penalty narrative, which is based on EPA corrections to the penalty calculation. CX161-164 are copies of the transcripts taken from the recent depositions taken in this matter. CX165-167 are documents which were exhibits in the DuRivage deposition in this matter and are being submitted as separate exhibits for the convenience of the Court. CX168 is the full set of cut sheets from which CX143 was pulled. CX169 is the resume of Complainant's expert witness David Clark. CX170 is a revised penalty narrative. CX171 is a more detailed explanation of the "Beyond BEN" portion of the penalty calculation than was previously supplied to the Court, and it has a revised total.

II. Standard of Review

Section 22.12(f) of the Rules states that a party must supplement prior exchanges “when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.” 40 C.F.R. § 22.19(f); *In the Matter of Mercury Vapor Processing Technologies, Inc., et al.*, Docket No. RCRA-05-2010-0015, 2011 EPA ALJ LEXIS 16 at *4 (July 15, 2011); *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 11 at *6 (May 14, 2010), and; *In the Matter of: 99 Cents Only Stores*, Docket No. FIFRA-9-2008-0027, 2009 EPA ALJ LEXIS 9 (June 18, 2009). Furthermore, motions to supplement a prehearing exchange should be granted unless there is evidence of bad faith, delay tactics, or undue prejudice. *In the Matter of Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 16 at *9 (April 12, 2006).

III. Discussion

The additions to the expert witness descriptions for Coad and Awanya provide additional information to the Court and Respondents regarding what to expect at the hearing in this matter. The need for additional expert witness David Clark arose after the depositions in this matter were taken. The additional exhibits are being submitted now for the following reasons: (1) CX160 and CX165-167 are being provided for the convenience of the Court and Respondents; (2) CX161-164 are the transcripts of the depositions recently taken in this matter; (3) CX168 is being provided to give the Court and Respondents the complete context for CX143; (4) CX169 is the resume of Complainant’s fourth expert witness in this matter; and (5) CX170-71 are being provided in order to supply the Court and Respondents with Complainant’s most recent penalty

calculation in this matter¹. In short, Complainant is providing the Court and Respondents with more complete and updated information, consistent with Section 22.12(f) of the Rules. 40 C.F.R. § 22.19(f). Complainant's prehearing exchange is incomplete without this additional information. Furthermore, this Motion is being submitted over three months prior to the start of the hearing, and approximately six weeks prior to the deadline for motions to supplement prehearing exchange set in this Court's Order on Motion for Third Party Discovery and Order Postponing Hearing and Revising Case Schedule (December 27, 2011). Accordingly, Respondents have ample time to review the information. In fact, Respondents already have copies of most of the exhibits being submitted by Complainant. Thus, Respondents will suffer no prejudice from the addition of the new witness information and proposed exhibits provided in Complainant's First Supplemental Prehearing Exchange.

IV. Conclusion

For the foregoing reasons, Complainant respectfully requests that the Presiding officer grant it leave to file its First Supplemental Prehearing Exchange.

¹ EPA is filing a Motion for Leave to Amend the Complaint with this Motion for Leave to File Its First Supplemental Prehearing Exchange.

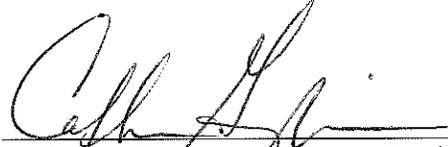
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Respectfully Submitted,

Counsel for EPA:

3/15/12
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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 "Complainant's Motion for Leave to File Its First Supplemental Prehearing Exchange", dated March 15, 2012, was 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 overnight mail to:

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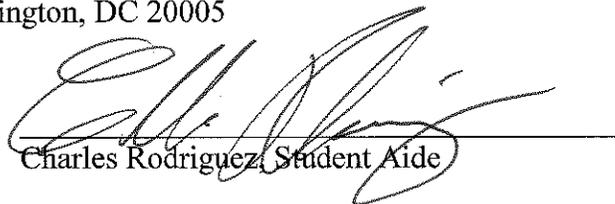
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The Honorable Susan L. Biro, Chief Administrative Law Judge
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3-15-12
Date


Charles Rodriguez, Student Aide

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