UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	
Carbon Injection Systems LLC;	)	
Scott Forster, President;	)	
Eric Lofquist, Vice President	)	**Docket No. RCRA-05-2011-0009**
Gate #4 Blast Furnace Main Ave	)	
Warren Township, OH 44483	)	
	)	
EPA ID No. OHR000127910	)	
	)	
Respondents.	)	

RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER AND ERIC LOFQUIST'S OPPOSITION TO COMPLAINANT'S MOTION *IN LIMINE*

Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, (collectively referred to as "Respondents") respectfully oppose the Complainant's Motion *in Limine* regarding 1) the expert testimony of Dr. Joseph J. Poveromo and Mr. Frederick Rorick; 2) presentation of testimony and evidence regarding Scott Forster and Eric Lofquist's ability to pay the proposed penalty; and 3) admission of certain Respondents' exhibits. Complainant's Motion as to issues 1 and 3 is without merit, as discussed in detail below and should be denied.

I. Motion *in Limine* Standard

While motions *in limine* are not addressed in the Consolidated Rules of Practice, Section 22.22(a) of the Consolidated Rules of Practice provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40. C.F.R. § 22.22(a). In such instances, when the Consolidated Rules of Practice are silent on an issue, the Presiding Officer may rely

on federal court practice, specifically, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, as guidance. See *In re Carroll Oil Company,* 10 E.A.D. 635, 649, (EAB 2002); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n. 10 (EAB 1993). Under federal law, motions *in limine* "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan,* 116 F.Supp.2d 966, 969 (N.D. Ill. 2000). Accordingly, if the evidence is not clearly inadmissible any "evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Technologies, Inc.* 831, F. Supp. 1398, 1400-1401 (N.D. Ill. 1993). Complainant has failed to establish that the evidence and testimony at issue in its motion *in limine* is clearly inadmissible pursuant to Section 22.22(a) of the Consolidated Rules of Practice; therefore, it should not be excluded.

II. Law and Argument

The evidence and testimony Complainant seeks to exclude is relevant, material, reliable, probative, is not duplicative and it should be admitted pursuant to Section 22.22(a) of the Consolidated Rules of Practice.

A. Expert Testimony from Dr. Poveromo and Mr. Rorick Is Not Duplicative.

Complainant's contention that two of Respondents' experts, Dr. Joseph J. Poveromo and Mr. Frederick Rorick, will offer the "exact same testimony" is incorrect. Contrary to Complainant's description of the testimony Dr. Poveromo and Mr. Rorick will provide, Respondents' Initial Prehearing Exchange expressly details the differences in the particular areas of expertise of the two experts. While both experts are blast

furnace experts, Dr. Poveromo and Mr. Rorick will not offer duplicative, repetitive or cumulative testimony. See Respondents' Initial Joint Prehearing Exchange pp. 7-9.

Dr. Poveromo and Mr. Rorick will provide different perspectives as to the issues involved in this hearing. Dr. Poveromo is an expert on the raw materials used in a blast furnace, the chemistry of the reactions and the economic aspects of iron-making. Mr. Rorick is particularly knowledgeable on blast furnace operations and has extensive field experience. Each expert witness will testify as to his area of expertise. Respondents do not intend to cover the same ground with the two experts as this would not be a beneficial use of time or Respondents' resources. The expert testimony of Dr. Poveromo and Mr. Rorick will be complementary, not duplicative. Moreover, the issue of burning for energy recovery, the issue to which Dr. Poveromo and Mr. Rorick will be testifying, goes to the very core of this case. Given the importance of this issue, Respondents should be allowed a reasonable degree of latitude to present the evidence necessary for their case.

Federal court decisions offer additional support for denying Complainant's motion *in limine* to exclude the testimony of either Dr. Poveromo or Mr. Rorick. While Federal Rule of Evidence Rule 403 can be used to exclude cumulative expert opinion testimony, no court has laid out a rule that a party can have only a single expert witness offer the same conclusion. *Green Constr. Co. v. Kan. Power and Lighting Co.,* 1 F.3d 1005, 1013 (10th Cir. 1993) (noting that limits on overlapping expert testimony should not be imposed "on the basis of mere numbers"). Respondents do not deny that both Dr. Poveromo and Mr. Rorick are blast furnace experts, but the fact that there are two experts testifying regarding the blast furnace is not a proper basis for the exclusion of one expert

from testifying, especially since the two experts will be offering different perspectives that are relevant to this issue.

For these reasons, neither Dr. Poveromo nor Mr. Rorick should be barred from testifying at the hearing, nor should either expert's testimony be limited.

B. Evidence of Individual Ability to Pay of Scott Forster and Eric Lofquist.

Respondents do not oppose exclusion of evidence regarding Scott Forster's and Eric Lofquist's individual ability to pay the proposed penalty. Respondents' May 4, 2012, Motion *in Limine* to Bar Evidence of the Financial Worth and Assets of Scott Forster and Eric Lofquist, also requested an order *in limine* barring the U.S. EPA from introducing any evidence at the hearing regarding the individual Respondents' financial information. Respondents expressly stated in their Initial Prehearing Exchange that they did not intend to present any evidence at the hearing of the ability of Scott Forster or Eric Lofquist to pay a civil penalty. Moreover, the Court's February 14, 2012 Order struck Respondents' affirmative defense for ability to pay as it pertained to Scott Forster and Eric Lofquist. Respondents subsequently withdrew this affirmative defense for Scott Forster and Eric Lofquist in their Answer to U.S. EPA's First Amended Complaint. Because this affirmative defense has been withdrawn, *any* evidence as to either individual's ability to pay is irrelevant to this proceeding. Should the Presiding Officer grant Complainant's motion to bar introduction of Scott Forster and Eric Lofquist's ability to pay, in the interest of fairness, Respondents request the order also preclude U.S. EPA from introducing evidence of Respondents' financial worth and assets for any other purpose.

C. Admissibility of Certain Respondents' Exhibits.

Respondents' exhibits RX19, RX20, RX24, RX25, RX26, RX27, RX28, RX30 and RX 32 contain relevant, material, and probative information and will be admissible. All of the documents Complainant seeks to exclude are relevant to either the issue of liability or the determination of penalty, and should not be excluded.

Respondents' exhibits RX19 and RX20 contain information that is relevant to the assessed penalty. Complainant claims that Respondents were motivated to purchase IFF's alleged hazardous waste based on price. RX19 and RX20 are a pricing chart and selected invoices for comparable products purchased by CIS during the relevant time.[1] Both documents contain relevant and material information as to the price CIS paid for comparable products. RX19 shows the price per gallon and RX20 is a sample of the invoices from 2007 for the comparable products. Both exhibits show examples of the prices paid for the materials during that time. These documents should be considered in assessing the specific penalty issue of economic benefit.

Complainants ignore Respondents' intended use of exhibits RX24, RX25, RX26, RX27, RX28, RX30, and RX31. These exhibits contain relevant information regarding the historical uses and the historical market for terpenes. These documents are relevant

[1] Complainant's suggestion in footnote 1 of its Motion *in Limine* that discusses Respondents' RX99 is unclear. Respondents have produced all invoices for the IFF materials that CIS has in its possession as RX99. An order requiring the production of *all* invoices, which seems to be U.S. EPA's request, would be burdensome and lead to the production of voluminous documents that would have limited relevance to the penalty issue in this case. If Complainant is requesting Respondents be ordered to introduce RX99, such an order would be beyond the authority of the Presiding Officer, as it is up to Respondents to decide what evidence they desire to introduce on their behalf. Without further clarification, Respondents cannot adequately reply to this request.

to the issue of liability as they offer support for Respondents' position that there is a market for terpene materials, which is a factor in determining whether a material is a product or a co-product. Establishing a market for terpene materials is relevant to Respondents' understanding that Unitene LE and Unitene AGR are not solid wastes, rather they are products. Counter to Complainant's position, these exhibits are relevant and material to the issue of whether Unitene is a solid waste.

Further, it is premature to determine whether RX19, RX20, RX24, RX25, RX26, RX27, RX28, RX30 and RX 32 will be admissible. Respondents are not required to explain the relevancy of all of their prehearing exhibits to the issues presented prior to hearing. See 40 C.F.R. §22.19(a)(2)(i) only requiring "copies of all...exhibits...." Without understanding the context for introducing the documents it cannot be concluded that the documents are "clearly inadmissible for any purpose." *Noble,* 116 F.Supp.2d at 969. Any ruling as to the admissibility of these documents should not occur until the hearing when Respondents are able to lay the proper foundation for the admissibility of the documents.

III. Conclusion

For the forgoing reasons Complainant's Motion *in Limine* should be denied, as to issues 1 and 3. Should Complainant's motion to bar introduction of Scott Forster and Eric Lofquist's ability to pay be granted, in the interest of fairness, Respondents request the order also exclude U.S. EPA from introducing evidence of their financial worth and assets.

Dated: May 11, 2012

Respectfully submitted,

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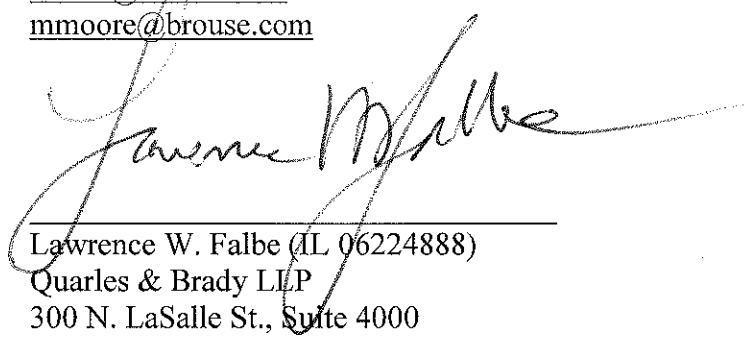

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Attorneys for Respondents Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist

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

CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that the foregoing Respondents Carbon Injection Systems LLC, Scot Forster and Eric Lofquist's Opposition to Complainants' Motion in Limine was sent on May 11, 2012, in the manner indicated, to the following:

Original and One Copy by hand delivery to:

LaDawn Whitehead, Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Copy by Overnight Delivery to:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

Copy by hand delivery to:

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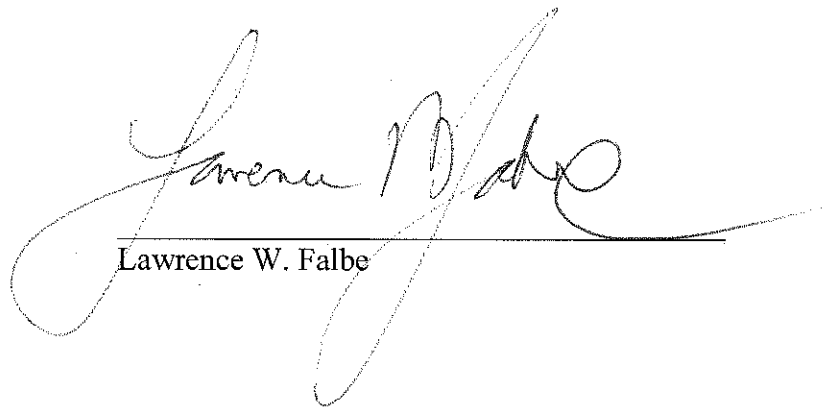
May 11, 2012



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