



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

Docket No. RCRA-05-2011-0049

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PROTECTION AGENCY

**ORDER ON JOINT MOTION FOR ENTRY OF STIPULATION
AND PROTECTIVE ORDER REGARDING CONFIDENTIALITY**

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 through 22.52 (“Rules of Practice”). The United States Environmental Protection Agency (“Complainant” or “EPA”) filed its Initial Prehearing Exchange on October 14, 2011. On that same date, the parties filed a Joint Motion for Entry of Stipulation and Protective Order Regarding Confidentiality (“Motion”) to prevent unauthorized disclosure of allegedly confidential business information (“CBI”) pursuant to 40 C.F.R. part 2, subpart B, or other private information.

“EPA administrative enforcement hearings are generally open to the public.” *Ronald H. Hunt*, EPA Docket No. TSCA-03-2003-0285, 2004 EPA ALJ LEXIS 133, *9 (ALJ, Aug. 3, 2004) (Order on Joint Motion for Protective Order, Complainant’s Motion for Discovery and Motion in Limine and Motion to Stay issuance of Witness Subpoenas) (citing 40 C.F.R. § 22.3(a)). However, the Rules of Practice also provide that:

In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential . . . unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer . . . may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding

shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

40 C.F.R. § 22.22(a)(2).

In the Motion, the parties stipulate that Respondents and other affected persons (collectively “submitters”) have submitted various documents to Complainant. The submitters claim that a number of these documents contain CBI pursuant to 40 C.F.R. part 2, subpart B, or other private information, and that these documents are entitled to confidential treatment. The parties refer to such documents containing confidential information as “Documents.” Motion at 1. The parties also stipulate that they expect to generate new documents that contain information the submitters claim is confidential. The parties refer to these new documents containing confidential information as “Document-Derived Materials.” Motion at 1. The parties stipulate that the filing of confidential information is necessary to the just adjudication of this Administrative Proceeding, and that Complainant has released or will release some Documents or Document-Derived Materials to Respondents pursuant to 40 C.F.R. part 2, subpart B. Complainant has not made a determination as to whether the information is entitled to confidential treatment under 40 C.F.R. part 2, subpart B. However, Complainant joins Respondents in requesting entry of a Stipulation and Protective Order to limit disclosure of allegedly confidential information in this proceeding.

Because the parties agree that documents or other materials in this proceeding may contain CBI or other confidential information, it is necessary to ensure that this information is treated as CBI in accordance with 40 C.F.R. part 2, subpart B, “unless and until any determination as to confidentiality and/or handling of the information in this matter is made by an [EPA] official with delegated authority to do so, or is made by a federal court with jurisdiction over the matter.” *Ronald H. Hunt*, 2004 EPA ALJ LEXIS 133, at *5. Therefore, good cause exists for the issuance of a protective order.

While a protective order is necessary in this matter, its terms must be tailored so that proceedings in this case are “closed only to the extent necessary to comply with 40 CFR part 2, subpart B.” 40 C.F.R. § 22.22(a)(2). The parties indicate that not all documents in this matter are Documents or Document-Derived Materials, as the parties have defined those terms, but the parties have not identified in their Motion which particular documents contain confidential information. However, Complainant does identify twenty such Documents or Document-Derived Materials in pages eleven through fourteen of its Initial Prehearing Exchange. In the list of potential exhibits included in Complainant’s Initial Prehearing Exchange, Complainant has identified the following exhibits as documents that contain confidential information by marking them (*CBI) or (*CBI REDACTED): CX2–CX3, CX5, CX7, CX9, CX11, CX21, CX24, CX31, CX39, CX71–CX72, CX80–CX85, and CX114–CX115. These documents are recognized as Documents or Document-Derived Materials because they contain confidential

information, and they are subject to this Protective Order. Respondents, in their joint Prehearing Exchange or, if filing separately, their individual Prehearing Exchanges, are directed to identify which of their exhibits contain confidential information in the same manner used by Complainant in its Initial Prehearing Exchange. Any exhibits not so marked will be presumed to be ordinary documents not containing confidential information, and therefore not subject to this Protective Order.

Nothing in this Protective Order constitutes a determination of confidentiality under 40 C.F.R. part 2, subpart B. Similarly, nothing in this Protective Order constitutes a ruling on the admissibility of any documents or other materials that may be offered as evidence in this Administrative Proceeding. This Protective Order shall remain in effect and be binding during any period of appeal unless expressly set aside or modified by the appropriate authority.

Upon consideration of the Joint Motion for Entry of Stipulation and Protective Order Regarding Confidentiality, **IT IS HEREBY ORDERED THAT:**

1. The following exhibits are hereby designated as containing “Confidential Information” by stipulation of the parties: CX2–CX3, CX5, CX7, CX9, CX11, CX21, CX24, CX31, CX39, CX71–CX72, CX80–CX85, and CX114–CX115. These exhibits, any exhibits identified as containing “Confidential Information” in Respondents’ Prehearing Exchange or Prehearing Exchanges, and any other documents or materials clearly stamped, marked, or otherwise identified as containing “Confidential Information,” shall be considered “Confidential Documents” and shall be handled in accordance with the terms of this Protective Order.
2. Any documents or other materials that contain Confidential Information and are to be served by the parties, shall be clearly stamped, marked, or otherwise identified as “Confidential.”
3. Parties to this litigation, and their officers, directors, representatives, agents, or employees, shall only use Confidential Information pertaining to others for purposes of this Administrative Proceeding and any appeals therefrom, and shall not disclose or permit disclosure of Confidential Documents or Confidential Information pertaining to others to any persons other than:
 - (a) the undersigned Administrative Law Judge, and her staff attorneys, legal staff assistants, and clerical personnel;
 - (b) EPA and/or court personnel to the extent necessary in connection with any appellate process in regard to this action;
 - (c) counsel for the parties to this proceeding, including necessary professional, secretarial and clerical personnel assisting such counsel,

provided that such persons agree to be bound by the provisions of this Protective Order;

(d) witnesses who are actively engaged in the hearing of this matter, provided that such witnesses agree to be bound by the provisions of this Protective Order;

(e) persons who authored or who received such Confidential Documents or Confidential Information prior to their submittal to EPA;

(f) independent consultants, witnesses, experts, and their staff who have been retained by the parties in connection with this Administrative Proceeding, provided that such persons are provided a copy of this Protective order and agree to be bound by it;

(g) commercial photocopying, document handling, and/or litigation support firms used by a party or party's counsel for photocopying, storage, review, retrieval, duplication or production of such Confidential Documents or Confidential Information, provided those firms agree to treat the Confidential Documents or Confidential Information as confidential;

(h) court reporters taking or recording testimony involving such Confidential Documents or Information and necessary stenographic, videographic and clerical personnel therefor; and

(i) any other person who is entitled to review such Confidential Documents or Confidential Information as a result of federal or state laws or court orders.

4. All consultants, experts, witnesses, litigation support firms, or other persons identified in Subparagraphs 2(d) through 2(g) of this Order, who in the course of this case may see or learn of any Confidential Documents or Confidential Information pertaining to others, or documents or information that are proposed to be designated as "Confidential Documents" or "Confidential Information," or who have access to any such documents or information, shall be provided with a copy of this Protective Order and required to be bound by and to sign a confidentiality agreement in the following form:

I, _____, have read a copy of the attached Protective Order entered in this case. I recognize that during my participation in the handling and development of this case I may have occasion to read or hear about documents or information pertaining to others produced in this litigation or other matters that are designated "Confidential Documents" or "Confidential Information." I agree to use any such documents or information solely in connection with my participation in this case. I agree

to abide by said Protective Order in every respect.

Signature

Date

Counsel for each party shall collect the signed confidentiality agreements for their respective consultants, experts and witnesses and retain them until the conclusion of the case, through the course of any administrative appeal to the Environmental Appeals Board and through the course of any appeal to a federal court.

5. All persons who obtain access to Confidential Documents or Confidential Information, shall take all necessary and appropriate measures pursuant to 40 C.F.R. part 2, subpart B, to maintain the confidentiality of the information pertaining to others, including, but not limited to, maintaining the information in a locked cabinet with limited access. Any person who obtains Confidential Documents or Confidential Information shall share such documents or information only with persons authorized to receive them pursuant to this Protective Order, and shall retain the information in a secure manner. Except as provided herein, no other person shall be permitted access to the information.

6. Any person who obtains lawful access to Confidential Documents or Confidential Information may make copies, duplicates, extracts, summaries, or descriptions of the Confidential Documents, Confidential Information, or any portion thereof, for the purpose of this Administrative Proceeding only and any appeals therefrom. All copies, duplicates, extracts, summaries, or descriptions shall be subject to the terms of this Protective Order to the same extent and manner as original documents.

7. Any documents or materials containing Confidential Information that are filed with this Tribunal shall be filed in sealed envelopes or other appropriate sealed containers, on which shall be endorsed the caption of this Administrative Proceeding, an indication of the nature of the contents of such sealed envelope or container, the word "Confidential," and a statement substantially in the following form: "This envelope contains Confidential Documents and/or Confidential Information that are filed in this case by (the "filing party") and are subject to a Protective Order, and this envelope shall not be opened and the contents are not to be displayed or revealed except by order of the Presiding Officer."

8. All Confidential Documents and Confidential Information filed in this Administrative Proceeding shall remain confidential and shall be accorded in camera treatment.

9. Any unauthorized disclosure of Confidential Documents or Confidential Information shall not result in a waiver of any claim of confidentiality.

10. At the hearing of this matter, to the extent possible, in referring witnesses to any Confidential Documents subject to this Protective Order, counsel shall utilize only the redacted versions of such documents. To the extent that counsel for either party intends

to refer a particular witness to an unredacted version of such a document, intends to elicit testimony which may refer to Confidential Information, or believes that Confidential Information may be mentioned in a particular witness's testimony, that counsel shall, before the hearing goes on the record, request that a certain portion of the hearing be closed to the public and that only the parties and counsel, the particular witness(es), and any other persons agreed upon by the parties, shall be present for that segment of the hearing. If no such request is made, or if during other portions of the hearing, it becomes apparent to counsel for either party that Confidential Information may be referenced in a witness's testimony, then that counsel shall promptly make an oral motion to close the relevant segment of the hearing to the public.

11. Complainant shall ensure that the contract for procurement of court reporting services in regard to the hearing of this case includes a provision which will prohibit the disclosure of any Confidential Information revealed at the hearing and/or of any Confidential Information contained in any exhibit accessible to the court reporter, except to the extent necessary to create, generate, and distribute to the parties in this case, their counsel and the undersigned a transcript of the hearing.

12. This Protective Order is without prejudice to the rights of any party to seek an order from the undersigned imposing greater, lesser or different restrictions on the dissemination of Confidential Documents or Confidential Information, or to seek to rescind, modify, alter, or amend this Protective Order with respect to specific documents or information.

13. Nothing in this Order shall affect the admissibility into evidence of Confidential Documents, Confidential Information, or other matters, as provided in 40 C.F.R. § 22.22(a)(2).

14. Within 30 days after this case is finally completed, whether by settlement, judgment or otherwise, including the final exhaustion of all administrative and judicial appeals, all copies of Confidential Documents or other materials containing Confidential Information, which are in the possession of any consultants, witnesses, staff, and/or parties to this litigation, and which pertain to others, shall be returned to the respective party's counsel. Within 60 days after this case is finally completed, each party's counsel shall destroy such copies, and all other Confidential Documents or other materials containing Confidential Information. Within 60 days after this case is finally completed, the undersigned, and her staff attorneys, legal staff assistants, and clerical personnel shall destroy all copies of Confidential Documents or other materials containing Confidential Information in their possession. The Regional Hearing Clerk shall retain and handle the original of such documents or materials as filed, consistent with EPA's record retention requirements and this Protective Order.

SO ORDERED.



Susan L. Birn
Chief Administrative Law Judge

Dated: October 26, 2011
Washington, D.C.

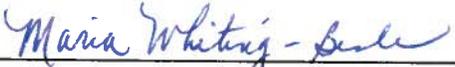
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In the Matter of Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, Respondents
Docket No. RCRA-05-2011-0009

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Joint Motion For Entry Of Stipulation And Protective Order Regarding Confidentiality**, dated October 26, 2011, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: October 26, 2011

Original And One Copy By Regular To:

La Dawn Whitehead
Regional Hearing Clerk
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77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

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