



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK U.S. ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
Carbon Injection Systems LLC,) Docket No. RCRA-05-2011-0009
Scott Forster,1)
and Eric Lofquist,)
Respondents.)

PREHEARING ORDER AND ORDER ON RESPONDENTS' MOTION FOR ADMINISTRATIVE SUBPOENA

As you were previously notified, I am designated to preside over the above-captioned matter. This proceeding will be 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 et seq. ("Rules of Practice"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, a Citizen's Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on the world wide web at http://www.epa.gov/oalj.

U.S. Environmental Protection Agency ("EPA" or "Agency") policy strongly supports settlement, and the procedures governing the documentation of settlement agreements are set forth in Rule 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The record shows that neither party accepted the invitation to participate in the Alternative Dispute Resolution process offered by this office. Respondents did, however, indicate that the parties are pursuing mediation options through the Agency's Conflict Prevention and Resolution Center, an entity outside the scope of this office and the Rules of Practice. The parties are commended for taking the initiative to resolve this matter informally and expeditiously. Nonetheless, the parties are reminded that bilateral negotiations are not affected by and do not affect the scheduling of this proceeding.

Additionally, on July 27, 2011, Respondents filed a Motion for Administrative Subpoena to Issue for the Deposition of International Flavors & Fragrances, LLC ("Motion"), in which Respondents request a subpoena for a non-party corporation pursuant to Rule 22.19(e). Motion

1 The Order of Designation previously issued did not include the individually named corporate officers. The caption has been corrected here to match the Complaint.

at 1. Respondents assert that the requested subpoena is necessary “[i]n order to prepare for mediation and, if necessary, for an eventual hearing.” *Id.* at 3. Furthermore, Respondents state that because the target deponent is not a party, Respondents “cannot obtain the information through the usual prehearing exchange process.” *Id.* Although the Motion sets forth the standard for deciding requests for subpoenas, Rule 22.19(e) explicitly states that “a party may move for additional discovery” “[a]fter the information exchange provided for in [Rule 22.19(a)].” 40 C.F.R. § 22.19(e). Accordingly, the Motion must be **DEFERRED** until after the prehearing exchange has been completed. At such time, Respondent may move for reconsideration of the Motion for Subpoena.

With these considerations in mind, the parties are directed to continue their mediated settlement negotiations and attempt to reach an amicable resolution of this matter. Complainant shall file a Status Report regarding the status of settlement on or before **August 26, 2011**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than **September 2, 2011**, with a copy sent to the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

Prehearing Exchange. Pursuant to Rule 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), the parties are directed to engage in the following prehearing exchange:

1. Each party² shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the undersigned as part of its Initial Prehearing Exchange:
 - (A) a list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of each witness’s expected testimony, and a curriculum vitae or resume for each identified expert witness, or a statement that no witnesses will be called;
 - (B) copies of all documents and other exhibits intended to be introduced into evidence, identified as Complainant’s or Respondents’ exhibits,³ as appropriate, and numbered with Arabic numerals (e.g., “CX 1”); and
 - (C) a statement explaining its views as to the appropriate place for the hearing and the

² Respondents may choose to file a joint Prehearing Exchange, or each Respondent may file separately.

³ If Respondents choose to file separate prehearing exchanges, the proposed exhibits should be identified as “Respondent CIS’s,” “Respondent Forster’s” or “Respondent Lofquist’s” exhibits.

estimated amount of time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules of Practice, 40 C.F.R. §§ 22.21(d) and 22.19(d). Also, state whether translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. In addition, Complainant shall file the following as part of its Initial Prehearing Exchange:

(A) a copy of any report(s) of the inspection referenced in Paragraph 27 of the Complaint, and a copy, as relevant to the allegations in the Complaint, of any photographs, videos, site maps, illustrations, analytical results, field notes, and/or other records created or taken by the inspector(s) during the inspection;

(B) a copy of any documents in support of those factual allegations denied or otherwise not admitted in Respondent's Answer, including but not limited to the following paragraphs in the Complaint: 5, 11-13, 15-17, 19-26, 28-32, 41, 43, 45-47, 50, 52-53, 57, 59, 62, 64-65, 67, 69-71, 73-75, 77, 79, 81, 83-84, 86, 88, 90, 95-97, and 99-103;

(C) a narrative statement explaining in detail how the proposed penalty was calculated, along with a copy of any EPA policy or guidance document upon which Complainant has relied, or intends to rely, in calculating the proposed penalty; and

3. In addition, Respondents shall submit the following as part of their Initial Prehearing Exchange(s):

(A) a copy of any documents in support of the denials of factual allegations made in the following paragraphs of Respondent's Answer: 5, 11-13, 15-17, 19-26, 28-32, 41, 43, 45-47, 50, 52-53, 57, 59, 62, 64-65, 67, 69-71, 73-75, 77, 79, 81, 83-84, 86, 88, 90, 95-97, and 99-103;

(B) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for Respondents' Affirmative Defenses number 1, 2, 5, and 7 as stated on page 33 of the Answer; and

(C) as Respondents have taken the position that they are, individually or collectively, unable to pay the proposed penalty, a copy of any and all documents they intend to rely upon in support of such position, including all documents provided to EPA as referenced in paragraphs 40-45 of the Complaint and Affirmative Defense 6; and

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondents' Initial Prehearing Exchange(s) as to provisions 3(A) through 3(C) above.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

September 2, 2011 Complainant's Initial Prehearing Exchange

September 23, 2011 Respondents' Initial Prehearing Exchange(s)

October 7, 2011 Complainant's Rebuttal Prehearing Exchange

Rule 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), provides that, except in accordance with Rule 22.22(a), **any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify.** Therefore, each party is advised to very carefully and thoughtfully prepare its prehearing exchange.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

Default and Opportunity for a Hearing. The Complaint notified Respondents of the opportunity to request a hearing, in accordance with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554 *et seq.* In their Answer to the Complaint, Respondents request a hearing. Pursuant to Section 554(c)(2) of the APA, 5 U.S.C. § 554(c)(2), a hearing will be conducted in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA, 5 U.S.C. § 556(d), provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondents have the right to defend against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Each Respondent is entitled to elect any or all three means to pursue his defense. If a Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing his Initial Prehearing Exchange. **Respondents are hereby notified that the failure either to comply with the prehearing exchange requirements set forth herein or to state that they are electing only to conduct cross-examination of Complainant's witnesses can result in the entry of a default judgment against the defaulting party. Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.**

The mere pendency of settlement negotiations or even the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the prehearing exchange requirements. Only the filing with the Regional Hearing Clerk of a fully-executed Consent Agreement and Final

Order, or an order of the judge, excuses noncompliance with filing deadlines.

Filing and Service. A document is “filed” when the Regional Hearing Clerk receives it. A document is “served” upon mailing or when placed in the custody of a reliable commercial delivery service. However, the parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by facsimile or email, in addition to the mailed hard copy, as physical mail delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the email address is oaljfilng@epa.gov. A signed certificate of service must be attached to all filed documents.

All documents served on the undersigned shall be addressed as follows if sent by regular mail:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

All documents served on the undersigned via Federal Express or any delivery service that x-rays its packages as part of its routine security procedures may be delivered directly 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

(*For commercial delivery service only)

The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the Presiding Judge, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the Presiding Judge except those that are fully executed and filed with the Regional Hearing Clerk.

Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 to ask whether a document has been received or issued. Email or telephone contact may be made with my staff attorney, Steven Sarno, Esq., at (202) 564-6245 (sarno.steven@epa.gov) for other procedural questions.


Courtesy Copies. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of substantive orders and decisions issued in this proceeding, the party shall submit a

request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motions for accelerated decision or dismissal, or (b) all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests but does not guarantee the party's receipt of expedited courtesy copies.

Motions. Prior to filing any motion, the moving party is required to contact the non-moving party to determine whether the non-moving party has any objection to the granting of the relief sought in the motion. The motion shall state the position of the non-moving party. The mere consent of the non-moving party to the relief sought does not assure that the motion will be granted. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the non-moving party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a 15-day response period for motions, with an additional five days added thereto if the motion is served by mail. Motions not filed in a timely manner may not be considered. **If any party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), it shall be filed within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Pursuant to Section 22.16(d) of the Rules of Practice, 40 C.F.R. § 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has access to videoconferencing technology and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and financial resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge


Dated: August 5, 2011
Washington, D.C.

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Docket No. RCRA-05-2011-0009

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order And Order On Respondent's Motion For Administrative Subpoena**, dated August 5, 2011, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: August 5, 2011

Original And One Copy By Regular To:

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

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