UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON RESPONDENTS' MOTIONS *IN LIMINE* TO PRECLUDE CERTAIN EVIDENCE OR TESTIMONY RELATING TO "PRIOR HISTORY"

The hearing in this matter is scheduled to commence on June 18, 2012. On May 4, 2012, Respondents filed a Motion *in Limine* to Preclude U.S. EPA's Evidence of "Prior History" ("First Motion" or "1st Mot.") and a Motion *in Limine* to Preclude Evidence or Testimony Relating to the "Prior History" of Scott Forster ("Second Motion" or "2nd Mot."). On May 17, 2012, Complainant filed a separate response to each ("First Response" or "1st Resp.", "Second Response" or "2nd Resp."). In their First Motion, Respondents seek to preclude Complainant from offering into evidence Complainant's proposed exhibits CX 49 through 53, and CX 97 through 111. 1st. Mot. at 1. Respondents' Second Motion concerns only CX 49, 50, and 52, and testimony associated with this subset of exhibits. 2nd Mot. at 1.

The exhibits, identified in Complainant's Initial Prehearing Exchange ("PHE") at pages 12-14, are here described as follows:

CX 49. A three-count, Criminal Charge brought by the United States against General Environmental Management, LLC, and Scott A. Forster, in the Northen District of Ohio. (Case No. 1:08-cr-00441-JRA) (Filed October 23, 2008)

CX 50. A Plea Agreement signed by Scott A. Forster in Case No. 1:08-cr-00441-JRA. (Filed November 8, 2008)

CX 51. A Plea Agreement signed by General Environmental Management, LLC, through its president, Eric E. Lofquist, in Case No. 1:08-cr-00441-JRA. (Filed November 8, 2008)

CX 52. Judgement against Scott Forster entered by Judge John Adams in Case No. 1:08-cr-00441-JRA. (Dated January 21, 2009)

CX 53. Judgement against General Environmental Management, LLC, entered by Judge John Adams in Case No. 1:08-cr-00441-JRA. (Dated January 21, 2009)

CX 97. Notice of Compliance from Ohio Environmental Protection Agency issued to representatives of General Environmental Management and K&B Capital LLC/TAJ Graphics alleging a violation of Ohio's hazardous waste regulations and identifying concerns regarding hazardous waste management practices. (Dated August 4, 2004)

CX 98. Notice of Violation from Ohio Environmental Protection Agency issued to a representative of General Environmental Management alleging violations of Ohio's hazardous waste regulations and identifying a concern regarding hazardous waste management practices. (Dated August 24, 2005)

CX 99. Complaint for Civil Penalty and Injunctive Relief brought by the State of Ohio against General Environmental Management, LLC, ESG Holdings LLC, Eric Lofquist, and Scott Forster in the Court of Common Pleas in Cuyahoga County, Ohio, alleging violations of state air regulations. (Filed February 27, 2006)

CX 100. Consent Order and Final Judgment Entry signed by the State of Ohio and General Environmental Management, LLC, through its president, Eric E. Lofquist, resolving Case No. CV-06-585239. (Filed March 13, 2007)

CX 101. A computer print out entitled National Response Center - Public Report, Incident Report # 794587, identifying General Environmental Management OH as a Suspected Responsible Party and describing the release of materials due to a fire/explosion of unknown cause at a hazardous waste facility. (Report dated April 20, 2006)

CX 102. Documents from the City of Cleveland's Fire Prevention Bureau discussing the response to a 3 alarm fire/explosion at a location described as "2655 - 2727 Transport Road - General Environmental Management" and a Meeting and Inspection on April 21, 2006. (Dated April 20, 2006)

CX 103. A computer print out entitled U.S. EPA Region V Pollution Report from Brad Stimple, On-Scene Coodinator discussing the "GEM Fire" on April 20, 2006. (Dated April 24, 2006)

CX 104. A letter from Sandy Buchanan, Executive Director of Ohio Citizen Action, to Administrator Stephen Johnson of the U.S. EPA regarding General Environmental Management and requesting U.S. EPA intervention. (Received May 12, 2006)

CX 105. A letter from Paul Little, U.S. EPA Region 5, to Eric Lofquist, President of

General Environmental Management, addressing the company's compliance with the federal regulations related to the generation, treatment and storage of hazardous waste. (Dated July 17, 2006)

CX 106. Notice of Violation from Ohio Environmental Protection Agency issued to Eric Loquist, President of General Environmental Management LLC, and Scott Forster, President of Carbon Injection Systems LLC, alleging violations of Ohio's hazardous waste regulations. (Dated August 21, 2006)

CX 107. A letter from Ohio Environmental Protection Agency to Eric Lofquist, President of General Environmental Management LLC, and ESG Holdings, LLC, addressing documentation submitted by General Environmental Management in response to the August 21, 2006, Notice of Violation. (Dated June 2, 2008)

CX 108. A letter from Ohio Environmental Protection Agency to Eric Lofquist, President of General Environmental Management LLC, and ESG Holdings, LLC, addressing documentation submitted by General Environmental Management in response to CX 107. (Dated February 17, 2009)

CX 109. A letter signed by Wade Balser, District Representative, Division of Hazardous Waste Management, to Scott Forster discussing an April 27, 2009, inspection at Recycling and Treatment Technologies' facility in Painesville, Ohio. (Dated May 8, 2009)

CX 110. A letter from the State of Michigan Department of Environmental Quality to Rob Slater, Operations Manager of Recycling and Treatment Technologies of Detroit, LLC, discussing a May 27, 2008, inspection at the company's Detroit facility. (Dated June 18, 2008)

CX 111. Notice of Violation issued by U.S. EPA Region 5 to Recycling and Treatment Technologies of Detroit, LLC, discussing Clean Air Act violations. (Dated September 27, 2010)

I. Legal and Regulatory Framework

Section 3008(a) of RCRA provides that the Administrator, in determining an appropriate civil penalty, "shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). While the Rules of Practice require the presiding Administrative Law Judge ("ALJ") to assess a penalty "in accordance with any penalty criteria set forth in" the operative statute, the ALJ is also required to "consider any civil penalty guidelines issued under" that statute. 40 C.F.R. § 22.27(b).

EPA's 2003 RCRA Civil Penalty Policy ("Penalty Policy") contains a section regarding upward adjustment of a penalty based on a history of noncompliance, which states:

> Where a party previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the party was not deterred by the previous enforcement response. Unless the current or previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.
>
> Some of the factors that enforcement personnel should consider in making this determination are as follows:
>
> - how similar the previous violation was;
> - how recent the previous violation was;
> - the number of previous violations; and
> - violator's response to previous violation(s) in regard to correction of problem.
>
> A violation generally should be considered "similar" if the Agency's or State's previous enforcement response should have alerted the party to a particular type of compliance problem. A previous violation of the same RCRA or State requirement would constitute a similar violation.
>
> Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute. Enforcement personnel should examine multimedia compliance by the respondent and, where there are indications of a history of noncompliance, the penalty should be adjusted accordingly.
>
> For the purposes of this section, a "previous violation" includes any act or omission for which a formal or informal enforcement response has occurred (*e.g.*, EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree). The term also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.
>
> In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, enforcement personnel should attempt to ascertain who in the organization had control and oversight responsibility for compliance with RCRA or other

> environmental laws. The violation will be considered part of the compliance history of any regulated party whose officers had control or oversight responsibility.
>
> In general, enforcement personnel should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, enforcement personnel should be wary of a party changing operators or shifting responsibility for compliance to different persons or entities as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance probably should apply unless the violator can demonstrate that the other violating corporate facilities are independent.

Penalty Policy at 37-38 (footnote omitted).

II. Positions of the Parties

A. Respondents' Arguments

Respondents characterize exhibits CX 49-53 and 97-111, as relating to "a variety of RCRA and non-RCRA compliance matters that concerned other companies directly or indirectly owned by Respondents Eric Lofquist and Scott Forster." 1st Mot. at 1. Respondents argue, however, that because these other matters do not concern Respondent CIS, do not involve the same type of RCRA requirements at issue in this case, and (in many cases) were not adjudicated, that these documents are immaterial, prejudicial, and of no probative value in this proceeding. *Id.* at 1-2. The nature of the proposed exhibits varies and Respondents offer different arguments for each type of document. They also make the general arguments that:

- Prior history should not be considered to increase a RCRA civil penalty because RCRA does not authorize the use of prior history as a penalty determination factor and the Penalty Policy is not binding on the ALJ,
- The Penalty Policy only contemplates increases in penalty based on prior similar history of the same party, and
- Due process requires that Complainant must prove and Respondents must be permitted to defend previously unadjudicated alleged violations before they can be considered in calculating the penalty.

1st Mot. at 2-6. Respondents then apply these general arguments and various specific arguments to each category of exhibits that they seek to exclude. *Id.* at 6-14. While the arguments are

tailored to the specific category of exhibits, Respondents' overall argument is that the exhibits do not even meet the criteria in the Penalty Policy. *Id.* at 6.

With respect to CX 50 and 52 and CX 49 as it relates to Respondent Forster, Respondents state that the criminal action arose from the wastewater treatment operations of GEM, which accepted an industrial wastewater treatment stream without the preapproval of the permitting authority. When approached by the permitting authority about this, Scott Forster falsely denied that the material entered GEM's wastewater treatment system. 2nd Mot. at 2. Respondents argue that the charges in the criminal matter are not similar to the allegations here, because they did not involve the CIS facility and will not establish that Respondents were on notice of EPA's interpretation of the recycling exclusion, that Scott Forster cooperated fully with the investigation and accepted responsibility for it, and that it involved a one-time incident that resulted in no environmental harm and was quickly corrected when the waste stream was approved by the permitting authority. *Id.* at 3. Respondents then assert that if the documents are admitted, it must be solely for the purpose of impeaching testimony from Scott Forster and Respondents must be given a "full and fair opportunity to explain the facts underlying the criminal complaint against" Scott Forster "necessitating another 'trial within a trial' and greatly complicating what is already expected to be a complex and lengthy hearing." *Id.*

With respect to CX 51 and 53 and CX 49 as it relates to GEM, Respondents argue that the federal criminal case against GEM addressed matters that were "unique to GEM's operations and did not involve the CIS facility" and, thus, will not address whether Respondents were "on notice" of the regulatory issues relevant in the case at hand. 1st Mot. at 14. Again, Respondents argue that introduction of these exhibits "would require that Respondents be given a full and fair opportunity to explain the facts underlying the case, necessitating another 'trial within a trial'" *Id.*

With respect to CX 97, 98, and 105-110, Respondents argue that "notices of violations of various RCRA housekeeping requirements" issued to GEM, Recycling & Treatment Technologies of Detroit, LLC ("RTT-Detroit"), and Recycling & Treatment Technologies of Ohio ("RTT-Ohio") are irrelevant, because the violations alleged in these notices did not involve the CIS facility, reflect occasional isolated incidents, and do not establish that Respondents were on notice of Complainant's interpretation of the recycling exclusion. *Id.* at 10. Respondents also argue that because the alleged violations were never adjudicated, their admission would require another series of "trials within a trial." *Id.* at 11.

With respect to CX 101-104, Respondents argue that "exhibits that relate to an unintended fire and explosion that occurred at the GEM facility in Cleveland" are irrelevant and unreliable hearsay. *Id.* at 8. Respondents assert that the notices of violation from Ohio EPA regarding the discharge of water used to put out that fire were subsequently retracted by Ohio EPA and, therefore, admission of those exhibits in this matter would require another series of "trials within a trial." *Id.* at 9.

With respect to CX 99, 100 and 111, Respondents argue that air pollution matters at other companies' facilities are irrelevant to this matter, because they are unrelated and "could not serve to have placed CIS on notice," and, because these allegations were abandoned or withdrawn by the State of Ohio, admission of that evidence in this proceeding would require more "trials within a trial." *Id.* at 7-8.

B. Complainant's Arguments

Complainant advances several arguments to address Respondents' claims that CX 49-53 and 97-111 are inadmissible. While Complainant concedes that "history of compliance" is not listed in the statute, the Penalty Policy specifically provides for consideration of this factor. 1st Resp. at 2-4. Moreover, Complainant notes that ALJs must consider the Penalty Policy in assessing a penalty. *Id.* at 4-6 (citing cases). Complainant argues that "history of compliance" can include consideration of other companies owned by a respondent in order to show that prior enforcement responses were insufficient to deter the party or that the party demonstrates a corporate-wide indifference to environmental protection. *Id.* at 6 (quoting CX 68 at EPA 17396).

According to Complainant, Respondents have informed EPA that Forster and Loquist occupied "leadership positions" not only in CIS, but also in GEM, RTT Ohio and RTT Detroit, which makes their roles in the actions of each corporation relevant. Complainant states that it "believes that violations found at facilities other than CIS, which are owned by Forster and Lofquist entities, is clear evidence that the parties were not deterred by the previous enforcement response, and are akin to 'noncompliance by many divisions or subsidiaries of a corporation.'" *Id.* (quoting CX 68 at EPA 17396). Complainant specifically argues that prior violations at the GEM facility should be treated as "akin" to violations by one family of companies, even if the facilities are in different geographical locations or controlled by subsidiaries or other divisions. *Id.* at 14. Complainant disagrees with Respondents' characterization of violations alleged in CX 97-98 and 105-110 as occasional, isolated incidents related primarily to housekeeping matters. *Id.* at 13 (quotations omitted). Rather, Complainant argues, "they depict a group of facilities under the control of Respondents Forster and Lofquist which were regularly cited for environmental violations. They clearly show a pattern of disregard of environmental requirements contained in RCRA." *Id.* (citing CX 68 at EPA 17395-96).

Complainant also asserts that the alleged prior violations need not relate to RCRA because the Penalty Policy directs EPA to consider violations of "another statute" that might show a pattern of disregard for environmental requirements. *Id.* at 11 (quoting CX 68 at EPA 17395-96).

With respect to the due process concerns raised by Respondents, Complainant argues that notices of violation, even if not adjudicated, are relevant and probative. *Id.* at 8-9 (citing *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 1998 EPA App. LEXIS 82, **48, 58-61, 82 (Mar. 13, 1998). Complainant argues that their admissibility must not be confused with the appropriate

weight that such notices might receive. *Id.* at 9 (citing *Goodman Oil Co. et al.*, Docket No. RCRA-10-2000-0113, 2003 EPA ALJ LEXIS 4, *94-95 (ALJ, Jan. 30, 2003)).

Complainant goes on to argue that the operations at GEM and RTT Detroit are, contrary to Respondents' assertions, similar to the operations at CIS, namely that they all receive or have received hazardous waste without a permit, as alleged in the notices of violation. 1st Resp. at 11 (citing CX 46 and CX 71). Complainant again argues that because Respondents Forster and Lofquist held or hold leadership positions at GEM and RTT Detroit, their actions (or inactions) at those other companies are relevant in this proceeding involving the individual Respondents themselves and their corporate Respondent CIS. *Id.* With respect to the records related to the GEM fire (CX 101-104), Complainant argues that the relevant environmental concern there (oil release and chemical spillage) put Respondent Lofquist on notice regarding an environmental matter, which is relevant to his history of compliance. *Id.* at 12 (citing *Zaclon, Inc., et al.*, 2007 EPA ALJ LEXIS 20, *13 (ALJ, June 4, 2007)).

Finally, with respect to the criminal conviction, Complainant notes that Respondent Forster pled guilty to the charges and received punishment from the court. Moreover, Complainant argues that the conviction was for knowingly and willfully making a false statement to an environmental official, which make the exhibits "particularly compelling evidence of a history of noncompliance." *Id.* at 15-16; 2nd Resp. at 5.

II. Legal Standard

A motion *in limine* is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing on the basis that it lacks relevancy and probative value. "[A] motion 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). Motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id.* at 1400-01. Thus, denial of a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion *in limine* means only that, without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

III. Discussion and Conclusion

First, the undersigned notes that although the ALJ is not bound by the Penalty Policy, this does not mean that evidence related to a party's compliance history is irrelevant and inadmissible. Nor does the absence of the term "history of noncompliance" from the statute

itself render such evidence inappropriate for consideration by the EPA or the ALJ. The Rules of Practice require that the undersigned "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). As described in Complaint's First Response, numerous decisions of Presiding Officers and the Environmental Appeals Board ("EAB") have utilized EPA's penalty policies to calculate the penalty, including in RCRA cases. 1st Resp. at 4-6. *See, e.g.*, *Titan Wheel Corp. of Iowa v. U.S. Envtl. Prot. Agency*, 291 F. Supp. 2d 899, 923-24 (S.D. Iowa 2003); *United States v. Bethlehem Steel Corp.*, 829 F. Supp. 1023, 1060 (N.D. Ind. 1993). Nevertheless, evidence of prior noncompliance that does not meet the criteria for consideration set forth in the Penalty Policy may be properly excluded if irrelevant.

Respondents' general arguments offered in their First Motion fail to recognize the multiple purposes for which Complainant may seek to use these various exhibits. Respondents repeatedly argue that the issues involved in CX 49-53 and CX 97-111 have little to do with hazardous waste recycling or burning, concluding that these notices of violation and other enforcement responses could not have provided specific "notice" to Respondents, such as would warrant a higher penalty for subsequent violations. In *Ocean State*, *supra*, the EAB Environmental Appeals Board ("EAB") observed that where a respondent has specific notice of a particular regulation (via a notice of violation) but still violated its requirements, the penalty might properly be adjusted upward to reflect a greater culpability and/or a greater need for deterrence. *Ocean State*, 7 E.A.D. at 558. However, it does not follow that evidence of earlier enforcement responses is *only* relevant if the subject matter is identical and there is evidence that these responses provided specific notice to the respondent. While the Penalty Policy states that "how similar the previous violation was" should be considered, it also provides that "a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute." Penalty Policy at 37. The Penalty Policy directs EPA to consider prior violations of other federal or state environmental statutes, including at other related facilities or locations, without reference to specific subject matter, reasoning "this is usually clear evidence that the party was not deterred by the previous enforcement response." *Id*. Complainant acknowledges that different "types of evidence of history of noncompliance must be weighed differently." 1st Resp. at 9. However, the undersigned agrees with Complainant that "this is completely different than not weighing them at all, as Respondent suggests." *Id*.

Additionally, the undersigned finds unpersuasive Respondents' argument that, because Respondent CIS is not named in the prior enforcement actions, the subject exhibits are rendered irrelevant. In discussing the difficulties associated with identifying legal connections between corporations, whether involving multiple divisions or new ownership, the Penalty Policy advises "[t]he violation will be considered part of the compliance history of any regulated party whose officers had control or oversight responsibility." Penalty Policy at 38. Complainant states that Respondent's have informed EPA that Respondents Forster and Loquist occupied "leadership positions" not only in CIS, but also in the companies that are the subject of the exhibits challenged by these pending motions. Whether Complainant can prove at hearing some overriding unity of control among these various corporations is not a determination that can be

made here. In any event, individual Respondents Forster and Lofquist *are* parties in this case, thus their own history of compliance would be relevant to the calculation of the penalty.

Finally, it is not clear from the record that admission of the subject exhibits would violate Respondents' due process rights. As Respondents note, there are circumstances where consideration of unadjudicated notices of violation are properly considered as part of the penalty calculation. *See, e.g.*, *Ocean State*, 7 E.A.D. at 559 (where the respondent was given notice and an opportunity for a hearing on whether the prior notice of violation should be considered in assessing the penalty for the subsequent violation, the requirements of due process under the U.S. Constitution were satisfied).

The particular context and purpose for which Complainant may choose to offer each exhibit at hearing will guide the determination as to its admissibility. Accordingly, Respondents' First Motion and Second Motion are **DENIED**.

SO ORDERED.

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Susan L. Biro
Chief Administrative Law Judge

Dated: June 7, 2012
Washington, D.C.