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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	**Docket No. RCRA-05-2011-0009**
Carbon Injection Systems LLC;	)	
Scott Forster, President;	)	
Eric Lofquist, Vice President	)	
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 JOINT PRE-HEARING BRIEF

I. INTRODUCTION

Scott Forster and Eric Lofquist formed Carbon Injection Systems LLC ("CIS") in 2004 for the sole purpose of supplying carbon-containing liquids, essentially oil, to WCI Steel, Inc. ("WCI"), for WCI's use in its blast furnace. The company's name, "Carbon Injection Systems," from the outset, was a reflection of that purpose. The state of the art facility was designed and built in 2004 to meet all applicable ASTM and AMSE standards. For example, the facility's above-ground storage tanks are situated on concrete pads within a concrete dike. Because many, but not all, of the products purchased for resale to WCI were regulated as used oil, the facility, appropriately, registered as a used oil facility and complied with Ohio EPA regulations applicable to used oil facilities.

As long as the steel mill was operating the blast furnace, CIS was successful. Over the years, CIS purchased and re-sold millions of gallons of carbon-containing oil to WCI, from hundreds of suppliers, often through brokers. As federal policy increasingly encouraged the use of renewable materials as replacements for non-renewable petroleum-based products, CIS increasingly purchased renewable plant and animal based carbon-containing materials as well. Such materials included Unitene LE and Unitene AGR, which are derived from natural pine oil, which were purchased through a broker, Aqua Fuels, from International Flavors & Fragrances, Inc. ("IFF"), in Augusta, Georgia.

The sales people with responsibility for purchasing material for the CIS facility were, from time to time, presented with opportunities to buy many different kinds of materials. On several occasions early on, these included several carbon-rich materials identified as hazardous wastes, including JLM Chemicals, Inc.'s Phenol Column Bottoms, a listed K022 hazardous waste. Respondents' response to these opportunities lies at the heart of this case. Complainant paints a picture of willful and knowing disregard for RCRA regulations motivated by profit, and seeks exorbitant penalties from the two individual officers of the company that it claims directed and profited from the alleged violations. The evidence, however, will show that Respondents conducted a careful inquiry into the regulatory implications of purchasing these materials, determined they were excluded from RCRA, decided to ask Ohio EPA for its interpretation *anyway*, and upon learning that Ohio EPA did not agree, decided to forgo the purchases,[1] opting for compliance certainty and simply choosing to purchase other materials instead. Those

[1] CIS accepted a single load of K022 waste from JLM a few weeks before learning of Ohio EPA's final answer, but it rejected all other JLM shipments.

other materials, including Unitene LE and Unitene AGR, never included a known or suspected hazardous waste.

This is not a case of willful non-compliance or profit. It is a case that concerns reasonable and good faith efforts to interpret complex environmental regulations. It does not, as U.S. EPA claims, concern willful noncompliance designed to generate profit at the risk of serious harm to human health or the environment.

II. STATEMENT OF THE CASE

Complainant filed its administrative complaint on May 13, 2011, asserting ten counts against all three respondents. Following an unsuccessful mediation and limited third-party discovery, the parties filed cross-motions for accelerated decision, which were denied on May 18, 2012. Parties subsequently filed multiple motions *in limine*, which also were denied. As a result, there are numerous legal and factual issues to be resolved following the hearing.

Numerous witnesses have been identified, including experts on both sides and numerous third-party fact witnesses for whom subpoenas have been requested and issued. The third-party witnesses include brokers who sold or offered for sale various products that are relevant to this case, and individuals employed by IFF who are knowledgeable about the development and manufacturing of IFF's Unitene products.

This prehearing brief is intended to provide a summary of the issues and facts that Respondents anticipate will be addressed at the hearing of this matter now scheduled to commence on June 18, 2012. Respondents do not waive any argument previously addressed in the motions that have been filed in these proceedings, in the pleadings, and

amendments thereto, and/or that may become apparent from the evidence that is presented at the hearing.

III. JURISDICTIONAL ISSUES

A. The Use of Carbon-Containing Materials In a Blast Furnace for the Production of Iron Is Excluded From RCRA Regulation Because Their Intended Use Is Not For Energy Recovery.

If the injectants sold by CIS to WCI were "incorporated as ingredients in an industrial process into the metallic iron produced by WCI" or were not "combusted for heat energy in the blast furnace," (May 18, 2012 Order on Motions for Accelerated Decision, p. 28 (hereafter "Order")) the recycling exclusion, OAC § 3745-55-02(E) [40 C.F.R. § 261.2(e)], was applicable and no RCRA violation occurred. As noted, this can be distilled into a question of chemistry. Respondents have the burden of proving that the exclusion applies, by a preponderance of the evidence.

Respondents' experts, Joseph J. Poveromo and Frederick Rorick collectively have nearly 90 years of experience in the field of blast furnace operations, and the science and technology of iron making. Joseph J. Poveromo, Ph.D., is an expert in the field of ironmaking, including specifically the effect on blast furnace performance and economics (i.e., production, hot metal cost, and hot metal quality) of various materials, including the components of the burden, coal mix changes and coke properties, various additives, and injectants (including natural gas, oil, tar and coal). Dr. Poveromo's expertise includes the related areas of blast furnace design and practice, and alternative ironmaking and direct reduction, including process assessment, economic analysis and the impact of raw material properties on process economics. Frederick J. Rorick is an expert in the field of ironmaking, including specifically blast furnace operations and the use of various types

of injected reductants and their effect on operations. Mr. Rorick also is an expert on blast furnace design, including both equipment and technical aspects and blast furnace process analysis and optimization.

Between them, they will describe how iron is produced by the chemical reactions that take place in a blast furnace, which Complainant's expert Dr. Fruehan accurately described as a "large shaft reactor." They further will testify that the purpose of using oil injectants to make iron is to supply carbon and hydrogen for the chemical reduction of iron ore. They will testify that oil injectants are *not* "immediately combusted" in the blast furnace as asserted by Dr. Fruehan and that, as a result, the injectants are a source of carbon in the molten steel. They further will testify that the purpose of using injectants is not to recover thermal energy, but rather that the reactions in which the injectants are involved are, on balance, endothermic, and that the injected oil has a "chilling" effect which may require the hot blast temperatures to be increased to compensate. Dr. Poveromo and Mr. Rorick's testimony will be based on their extensive experience and their review of scientific and technological treatises, articles and papers typically relied upon by experts in their field.

If it is determined that the injectants, including the three products that Complainant claims were hazardous wastes, were not used in a blast furnace for the purpose of recovering their heat energy, such that their use is excluded from RCRA regulation, this would resolve this entire case and no further issues would need to be considered. Although Respondents have the burden of proof to show that the use of the three products falls within the exclusion, if it is determined that the exclusion does not apply, Complainant still must meet its burden of proving, by a preponderance of the

evidence, that two of the three products, Unitene AGR and Unitene LE, are solid and hazardous wastes, as discussed below. In re General Motors Automotive - North America, No. RCRA (3008) Appeal No. 06-02, Remand Order (EAB June 20, 2008).

B. Unitene LE and Unitene AGR Are Neither Solid Nor Hazardous Wastes.

In order to establish a *prima facie* case, Complainant has the burden of proving, by a preponderance of the evidence, that Unitene AGR and Unitene LE, each are a "solid waste" as that term is defined under OAC § 3745-50-10 (A)(107) [40 C.F.R. § 261.2]. (Order, p. 14). Complainant has the further burden to prove that, if Unitene AGR and Unitene LE are solid wastes, then they also are hazardous wastes as that term is defined under OAC § 3745-50-10 (A)(48) [40 C.F.R. § 261.3]. The burden of proof on this issue is important because, as the evidence will show, Respondents purchased the Unitene products through a broker, neither IFF nor the broker considered Unitene to be a waste, and at the time of purchase, Respondents were never provided any information that would have suggested that these products were wastes, or even "recycled materials," as Complainant now claims. At no time while the CIS facility was still operating were Respondents even aware that anyone, including Complainant, considered these materials to be wastes. Respondents' access to information after-the-fact regarding the development and production of IFF's Unitene products was initially limited to the selective information obtained by Complainant as a result of its enforcement-related information gathering activities. Subsequent information coaxed from IFF or obtained through the expedient of third-party discovery subpoenas issued over the fierce opposition by Complainant, clarifies the information initially relied upon by Complainant, largely refuting Complainant's contentions. As a result, Respondents

expect that Complainant's evidence will fall well short of the preponderance needed to prove that Unitene AGR and Unitene LE are solid or hazardous wastes.

1. Unitene is a Co-Product, not a By-Product.

Products or "co-products" are not regulated under RCRA because they are not wastes, having not been discarded. Complainant has asserted that the Unitene materials are a regulatory by-product being burned to recover thermal energy or, alternatively, a commercial chemical product being burned for thermal energy recovery, and thus solid waste. (Order, pp. 11-14). Complainant has the burden to prove at least one of these assertions is correct.

Two employees of IFF, Thomas Guido and David Shepherd, who were directly involved in the development and production of the Unitene products, have been subpoenaed to testify at the hearing, along with Richard Murray, the Florida broker who arranged the sale of the two products to CIS. They will testify that both Unitene AGR and Unitene LE were manufactured intentionally by IFF, and were intended to be marketed as useful products, in the same manner as many of IFF's other commercial products. Unitene AGR and Unitene LE required no further processing by IFF or CIS to be utilized by WCI in its blast furnace. In fact, the Unitene products are quite analogous to the several differing co-products produced by distillation of petroleum, as well as other examples of such co-products, provided in U.S. EPA letter guidance.

In addition, Unitene LE and Unitene AGR were marketed to typical industrial customers of similar types of products, i.e. the "general public." IFF's marketing of Unitene, and the fact that a market for such products existed generally, will be shown by

evidence of the trademark efforts of IFF and others, and general literature regarding the historic production and use of virtually identical products by other companies.

The evidence at the hearing will conclusively show that the Unitene products were consistently handled by IFF as valuable commodities, with the utmost concern for their product integrity, and were not produced or handled as a waste. This concern and treatment was carried through by CIS, which, having paid competitive prices for the products, also handled this material as a valuable product and resold it as such to its customers. In sum, the overwhelming weight of evidence will show that Unitene LE and Unitene AGR are products or co-products, and Complainant will fail to meet its burden to prove, by a preponderance of the evidence, that Unitene LE and Unitene AGR are by-products.

2. Unitene is Not a Distillation Column Bottom.

Complainant is expected to argue that the Unitene LE and Unitene AGR constitute "distillation column bottoms," (a/k/a 'still bottoms') which are specifically referred to as an example in the regulatory definition of "by-product." OAC § 3745-51-01(C)(3) [40 C.F.R. § 261.(c)(3)]. Respondents expect the evidence at the hearing to show that, despite some references to Unitene as "bottoms" by IFF plant employees, such casual expressions were not intended to have regulatory significance and are insufficient to prove that either Unitene LE or Unitene AGR are residual "distillation column bottoms." Rather, the IFF personnel will testify that the Unitene products were distilled fractions and were clear liquids and did not contain sludges or residues of any kind. As will be explained by Respondents' expert, Dr. Bruce Sass, the Unitene products are no

more still bottoms than heavy fuel oil is a still bottom resulting from the distillation of petroleum, or molasses is a still bottom resulting from the refining of cane sugar.

3. Unitene is Not a Discarded Commercial Chemical Product.

Complainant's fall-back position is that even if the Unitene products are not regulatory by-products, they are commercial chemical products that are not being used for their original intended use. (Order, p. 11). The issue here is whether the Unitene products were used for their original intended purpose. 40 C.F.R. § 261.33. Complainant has the burden of proof on this issue.

The evidence will show that Unitene was produced by IFF and sold as a product for industrial use. All parties involved -- IFF, AquaFuels, and CIS -- clearly understood the use to which Unitene was to be put by WCI, which was as a reductant for the production of iron in the blast furnace. IFF developed the product with this particular use in mind. Thus, even if Complainant's interpretation of 40 C.F.R. § 261.33 is correct (i.e., that a commercial chemical product is "discarded" if it is used in a manner that is not its "normal" use), because IFF understood from the beginning that WCI intended to use Unitene as a carbon replacement, that use is a legitimate, "normal" use of Unitene.

The products were new, unspent material when sold, were not wastes, and had not been discarded. If U.S. EPA is determined to have sweeping jurisdiction over the production and sale of the Unitene products, such that U.S. EPA could dictate to producers and consumers what is the "normal" use of their products, this would amount to an impermissible intrusion into the production process well beyond U.S. EPA's authority under RCRA.

C. **Alternatively, The Use of Unitene LE And Unitene AGR For Energy Recovery Is Excluded From RCRA Regulation Because They Are Fuels.**

As recognized in the May 18, 2012 Order, an alternative approach to analyzing the regulatory implications of using the products at issue in this case as injectants in a blast furnace is to consider whether they are fuels. If the materials are fuels, they can be legitimately recycled by being burned for energy recovery because burning for energy recovery would be their normal use. 40 C.F.R. § 261.2(c)(2)(ii). Ironically, Complainant goes to great lengths to characterize the injectants as "fuels" -- that is, up until the point in the regulatory analysis where that characterization would lead to the conclusion that burning them in a blast furnace did not violate RCRA after all. Respondents consistently maintain that utilizing the IFF and JLM materials in the WCI blast furnace does not constitute "burning for energy recovery" because the facts support that conclusion. But, should Complainant convince the Presiding Officer that injectants are better characterized as fuel that was burned for energy recovery, then Complainant should be held to that determination for purposes of applying 40 C.F.R. § 261.2(c)(2)(ii), which would then exclude them from the definition of solid waste.

In support of this alternative argument, Respondents will present the testimony of Dr. Bruce Sass, an expert in analytical and physical chemistry and the properties of organic and inorganic materials, who is experienced in working with terpenes such as Unitene, and is knowledgeable about the fuel-like properties of various materials. Dr. Sass will rely, in part, on various U.S. EPA guidance letters that discuss how substances that resemble fuels, even if not off-specification or "benchmark" fuels themselves, can be deemed fuels and can be burned for energy recovery without running afoul of RCRA.

D. Scott Forster and Eric Lofquist Were Not Operators of Carbon Injections Systems LLC's Warren, Ohio Facility.

In order for Respondents Scott Forster and Eric Lofquist to be found individually liable in this case, Complainant must prove, by a preponderance of the evidence, that they were operators of CIS's Warren, Ohio, facility. Fundamentally, a corporate officer who is not an owner or operator cannot be deemed liable for a violation of a rule that applies only to owners and operators. In the Matter of Southern Timber Products, Inc., 3 E.A.D. 880, 888, 1992 WL 82626 (E.P.A. Feb. 28, 1992)("Southern Timber-II"). An operator is one who exercises active and pervasive control of the overall operations of a facility, which depends on an evaluation of the universe of operational duties, not just a litany of separate or isolated instances where an individual exercised control. Accordingly, whether an individual was an operator depends on a wide array of facts and circumstances, including the factors set forth in Southern Timber-II. Respondents Eric Lofquist and Scott Forster both will testify regarding these matters, as will two former employees of CIS, John Dzugan and Robert Malecki.

The evidence at the hearing will show that Mr. Lofquist and Mr. Forster are executives, with equally-shared ultimate authority, who exercised no real active control over the CIS facility. Furthermore, the evidence, particularly the testimony of Mr. Charpia, Mr. Willis, Mr. Gephart and Mr. Osiecki, who all interacted with Respondents and Ohio EPA seeking regulatory approval, will show that Mr. Forster and Mr. Lofquist "arrived at a facially reasonable but ultimately incorrect reading of a RCRA rule, and thereby authorized conduct later determined to be a violation." Without more, Complainant cannot meet its burden under Southern Timber II to establish individual operator liability for the RCRA violations alleged in the complaint.

IV. RESPONDENTS' AFFIRMATIVE DEFENSES

Respondents have withdrawn their fifth affirmative defense based on Carbon Injection System LLC's inability to pay. Respondents' first, second, third, fourth and sixth affirmative defenses are relevant to the mitigation of any penalty that may be assessed, and are addressed in Respondents' discussion of penalty issues, below, or will be addressed in Respondents' post-hearing submissions. (February 14, 2012, Order on Complainant's Motion to Strike Affirmative Defenses).

Respondents' seventh affirmative defense is that the fair notice doctrine precludes liability for CIS's receipt of the single shipment of phenol column bottoms from JLM Chemicals. Respondents, Mr. Charpia, and others involved in seeking regulatory approval will testify that up until December 20, 2005, Respondents reasonably, and in good faith, interpreted the RCRA exclusion to apply to the injection of high carbon-containing materials into the blast furnace, and they believed that Ohio EPA likely would concur with that interpretation. Not only did the plain language of the regulations support Respondents' interpretation, but both the Louisiana Department of Environmental Quality[2] and the Ohio EPA had provided some preliminary indications of their concurrence. The limited regulatory guidance materials that were accessible at the time, including the discussion of Cadence 312 found in the Federal Register, were equivocal, inherently contradictory, or arguably inapplicable.

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[2] The Louisiana Department of Environmental Quality, in connection with Respondents' efforts to obtain regulatory guidance, stated that "The easiest way out for demonstrating use of K022 waste as feedstock is to show that some carbon from the K022 will be consumed to become carbon in the steel. This way the K022 is a carbon feedstock for steel manufacturing." (See, June 10, 2005, E-mail Message from Charles W. Handrich, Louisiana EPA, to Troy Charpia, CX13, p. EPA-10159).

On December 20, 2005, Respondents were advised that Ohio EPA did not concur. From that time forward, although Respondents continued to believe that their interpretation was correct, and for a time undertook significant efforts to convince the Ohio EPA to reconsider its position, they nonetheless abided by Ohio EPA's determination. Complainant's argument that Respondents purchased hazardous waste for the blast furnace knowing that they were violating RCRA is based on the later purchases of Unitene LE and Unitene AGR, which Respondents had no reason to suspect might be hazardous wastes. Had they suspected Unitene LE and/or Unitene AGR were hazardous wastes, they would have done what they did in every other instance when offered such materials -- they would have approached Ohio EPA for guidance (before December 2005) or they simply would have declined to purchase the material (after December 2005). There is no evidence to the contrary.

The issue is whether by reviewing the regulations and other public statements issued by the agencies, Respondents, acting in good faith, were able to identify, with "ascertainable certainty," the standards with which the agencies expected them to conform. Four principle factors should be taken into account: 1) the text of the regulations; 2) the regulations as a whole; 3) the regulatory history or agency interpretive guidance; and 4) Respondents' inquiries into the meaning of the regulation. Respondents will present evidence on these last two factors at the hearing, the first two being more properly the subject of judicial notice. These factors must be viewed from the perspective of the regulated party. General Electric Co. v. U.S. EPA, 53 F.3d 1324, 1329 (D.C. Cir 1995); United States v. Southern Indiana Gas and Electric Co., 245 F. Supp.2d

994, 1010 (S.D. Ind. 2003); United States v. Hoechst Celanese Corp., 128 F.3d 216, 224-230 (4th Cir. 1997).

In this case, the fair notice doctrine precludes the imposition of civil liability with respect to CIS's receipt of the single test shipment of K022 waste from JLM Chemicals, Inc. on November 21, 2005.

V. PENALTY ISSUES

As explained above, Respondents expect that Complainant will fail to prove its liability case against Respondents on all counts such that no civil penalty is warranted. Even if Respondents, or some of them, are found liable, however, the penalty sought by Complainant is inappropriate for at least the following reasons.

A. Even if Liability Is Found As To Some or All Respondents, Only a Minimal Gravity-Based Penalty Is Appropriate.

The appropriateness of any penalty must be determined based on a fair and objective evaluation of the gravity of the harm that was caused or could have been caused, and potentially other factors such as any unfair economic benefit that inured to the non-compliant party. Complainant grossly overstates the potential harm that could have been caused by Respondents' purchase of the three products as issue here, substituting wild and unsupported speculation for facts. In addition, Complainants' evaluation of the so-called economic benefit that Respondents enjoyed as a result of their alleged non-compliance lacks foundation, is replete with errors and is largely unsupportable.

1. Complainant's Penalty Narrative Grossly Mischaracterizes and Overstates the Potential for Environmental Harm Posed by Respondents' Alleged RCRA Violations.

Complainant has both the burden of production and the burden of persuasion that its proposed penalty is reasonable in light of all the statutory factors and that it is appropriate. To meet its burden, Complainant must come forward with evidence, not mere speculation and innuendo. Complainant's Penalty Narrative theorizes that Respondents' activities that are the subject of the Complaint *might* have caused substantial environmental harm. Ostensibly utilizing its RCRA Penalty Policy framework,[3] Complainant speculated about the "probability of exposure" and the "potential seriousness of contamination," in order to arrive at its conclusion that the alleged RCRA violations should be considered "major."

Respondents expect that Complainants will be able to offer no real probative evidence at the hearing to support its inflated proposal.

Complainant has no evidence (because there is none) that the three products at issue in this case, which comprise less than 2% of the total volume of oil through the facility, contained any toxic constituents not otherwise contained in the 98% of products purchased by CIS and delivered to the blast furnace. Complainant has no evidence (because there is none) that the inclusion of the three products contributed in any way to any hazardous air emissions or any threats of spills. No data contained in the documents designated by Complainant in its pre-hearing exchange suggests that the liquid carbon

[3] While Complainant is compelled to follow its own penalty policy, it is well-established that U.S. EPA's penalty policy "does not bind the ALJ or the [Environmental Appeals] Board, since these policies, not having been subjected to the rulemaking procedures of the Administrative Procedures Act, lack the force of law." In re M.A. Bruder and Sons, Inc., 10 E.A.D. 598, 610 (E.P.A. July 10, 2002) (citing cases).

substitutes purchased by CIS contained significant levels of contaminants, such as those identified in Appendix VIII of 40 CFR 261.[4] The two IFF witnesses are expected to testify, consistent with their deposition testimony, that IFF's Unitene products were unspent and contained no contaminants. Dr. Sass is expected to testify, consistent with his expert reports and declarations, that the carbon-containing materials purchased by CIS contained no Appendix VIII contaminants, and therefore such materials were not "toxic" by any definition. Dr. Sass also will testify that Unitene is not the type of inherently waste-like material, such as reclaimed solvents and other contaminant-laden wastes, which led to U.S. EPA's regulation of cement kilns, boilers and industrial furnaces.

Similarly, Complainant has no evidence (because there is none) of any spills or releases from the facility. Complainant has produced no evidence of any actual releases of any materials to the soil or groundwater at or near the CIS facility resulting from CIS's operations. Complainant's Penalty Narrative also ignores relevant facts, of which Complainant is well-aware, that CIS was a new, state-of-the-art facility, it had an appropriate contingency plan, and that the facility had coordinated with local fire and emergency management personnel. The potential for environmental harm in this case can reasonably be characterized as no more than minor, not major, as proposed by Complainant.

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[4] Appendix VIII in 40 CFR Part 261 is the list of hazardous constituents that identifies the universe of chemicals of concern under RCRA. This list was first promulgated in the May 19, 1980 Federal Register (45 FR 33130)("Hazardous Waste Management System; General")(promulgating Parts 261, 264, 265, 122, 123 and 124 of 40 CFR). Appendix VIII lists chemicals which have toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms.

2. Lack of Evidence of CIS's Intent to Violate the RCRA Regulations Militates Against a Finding of Significant Harm to the RCRA Program.

Complainant asserts that Respondents have caused "substantial" harm to the RCRA regulatory program by "circumventing" U.S. EPA's cradle-to-grave regulation of hazardous waste. Respondents do not dispute that the underlying goal of RCRA to manage and regulate hazardous waste provides significant benefits to society, or that U.S. EPA has a strong interest in deterring willful violations of RCRA, and its penalty policy is intended both to punish violators and discourage potential violators. Respondents further recognize that RCRA liability is strict. However, the mitigating circumstances in this case are such that it would be inappropriate to characterize any harm to the RCRA program as anything other than minor. Complainant's own enforcement efforts are inconsistent with its characterization of the violations in this case and the penalties it has calculated as a result. Complainant's attempt to significantly penalize the activity which it contends violated RCRA is of little or no benefit to the continued integrity of the RCRA program.

The evidence will demonstrate that Respondents did not ignore RCRA regulatory requirements, but rather made a good faith effort to understand them and to comply with them. With respect to every material steam offered to them for sale that was known to be a waste, Respondents proactively sought Ohio EPA's guidance with respect to applicable RCRA exemptions.

Respondents did not know, and reasonably should not have known, that IFF's Unitene products could be considered wastes subject to RCRA regulation. Unitene was not offered to CIS as a waste. Although they were aware of the intended use for the Unitene, neither IFF nor its broker ever communicated any information to CIS that

suggested that Unitene was a waste. IFF shipped Unitene to CIS on bills of lading, accompanied by Material Safety Data Sheets and certificates of analysis, none of which documentation reflected in any way that the products were wastes, and CIS paid market price for the Unitene, as a non-hazardous, non-waste product.

Complainant delayed disclosing to Respondents that it considered IFF's Unitene products to be wastes, even after it initiated these enforcement proceedings, and Complainant has resisted all efforts by Respondents to obtain, after-the-fact, any information regarding the true nature of IFF's Unitene products. Complainant also took no immediate enforcement action against IFF or WCI, the two entities best positioned to avoid the "significant harm" posed by the use of IFF's products as injectants in the blast furnace, focusing its enforcement efforts instead on CIS alone, a middleman that neither generated the material nor burned the material.

Complainant's claim of significant damage to the RCRA program and its characterization of Respondents' actions as an "extremely serious violation of RCRA" are not well-founded, and any penalty assessed must consider these critical points.

3. Multi-Day Gravity Based Penalties Are Not Appropriate.

Complainant's case against Respondents is based on 189 shipments of IFF's Unitene products to CIS, and a single shipment from JLM Chemicals. In the event that liability is found against Respondents as to the JLM material, but not the IFF products, such a finding should significantly reduce any multi-day penalty assessment.

CIS's temporary storage of the single shipment from JLM Chemicals to CIS's facility does not mean that CIS's facility was a treatment, storage and disposal (TSD) facility that should have been permitted under RCRA. In re M.A. Bruder and Sons, Inc.,

RCRA (3008) Appeal No. 01-04, Final Decision (EAD July 10, 1992). Pursuant to In re M.A. Bruder and Sons, Inc., the RCRA violation that resulted from receipt of this single shipment continued, at most, for five or six days. These facts do not support the 180-day penalty proposed by Complainant.

Respondents do not contend that *any* multi-day penalty could not be awarded if it is determined that the recycling exclusion does not apply to CIS's receipt of the one shipment from JLM Chemicals. Any multi-day penalty however, should be limited to the duration of the offense. The evidence at hearing will show that the one shipment would have remained at the CIS facility for no longer than a few days before being transferred to WCI. Thus, multi-day gravity-based penalties, if determined to be appropriate at all, should be limited to those few days.

B. Presuming Liability Against Some or All Respondents, Complainant's Demand for Economic Benefit Penalties Must Be Denied or Adjusted.

Of the almost two million dollars in penalties sought by Complainant, a considerable portion, $395,362, is attributable to economic benefit (or "BEN") penalties, as opposed to gravity-based penalties. Whereas gravity-based penalties are intended to reflect the seriousness of the harm or potential harm to human health and the environment or to the RCRA regulatory program itself, economic benefit penalties are intended to level the playing field and remove any incentive for non-compliance from a profit-based standpoint, as compared to a violator's theoretically compliant competitors in the marketplace. See, Calculation of the Economic Benefit of Noncompliant in EPA's Civil Penalty Enforcement Cases, 70 FR 50326 (August 26, 2005).

Here, Complainant alleges that CIS realized an improper economic benefit that CIS would not otherwise have realized if the alleged violations had not occurred, i.e., had

CIS acted in compliance with the regulations. This economic benefit has two separate components: costs of compliance that were avoided or delayed, and alleged illegal profits that were obtained as a result of the non-compliant activities, referred to generally as "Beyond BEN."

Respondents' expert Chris McClure has analyzed Complainant's penalty calculations and will testify as to the flaws in Complainant's BEN calculations, and the inappropriateness of assessing any Beyond BEN penalties in this case.

1. No Economic Benefit Penalties Are Appropriate Solely Based on CIS's Handling of the JLM Material.

Complainant has asserted that the present value of the costs of compliance that CIS unjustly avoided or delayed amount to $131,061 (revised by Complainant from its initial calculation of $79,462). This amount theoretically represents the cost of obtaining a RCRA permit, including associated application fees, costs for waste analysis, tank certification and similar costs, as well as costs associated with developing and maintaining closure plans. These amounts should not be included in any penalty for two reasons. First, CIS's receipt and temporary storage of hazardous wastes, if proven to violate RCRA, does not mean that it was an unpermitted TSD facility, and does not mean that it should have undertaken all of the steps to become fully permitted as such. Other, far less costly, alternatives exist to bring a facility into compliance after such an episode, if necessary. Second, Complainant seeks a compliance order in this case, which if issued would require Respondents to now incur the costs Complainant claims it previously avoided. Imposition of both a compliance order and a penalty based on avoided costs of compliance would result in the imposition of the same costs twice, which would be impermissible double dipping.

2. Complainant's BEN Calculation is Significantly Flawed.

Alternatively, presuming that liability is proven against Respondents and the Presiding Officer determines that costs of compliance represent an appropriate component of the economic portion of the penalty, Respondents do not contest the theoretical recoverability of delayed and avoided costs of compliance as a component of the demanded civil penalty. Mr. McClure, however, will testify that Complainant's BEN calculations are inappropriate. For example, Complainant's use of weighted average cost of capital is incorrect. Mr. McClure will offer alternative calculations for a more appropriate penalty.

3. No "Beyond BEN" Penalties Are Appropriate.

As noted in the May 18, 2012 Order, Respondents do not dispute the legitimacy of recovery of 'illegal profits' by Complainant under certain circumstances. (Order, at 31, citing In re Crescio, 5-CWA-98-004, 2001 EPA ALJ LEXIS 143 (E.P.A. May 17, 2001). This is not one of those cases. Unlike in Crescio, Complainant's claim in this case both for penalties for non-compliance (which places a present dollar value on the costs of such compliance, had the violator taken the proper course of action under the regulations to begin with), and for alleged illegal profits that were realized by CIS as a result of its non-compliance, is impermissible "double-dipping" that goes far beyond "leveling the playing field," and should not be condoned or accepted.

As noted above, Complainant has asserted that the present value of the costs of compliance that CIS unjustly avoided or delayed amount to $131,061. It is clear that by putting a price tag on the activities that Complainant claims CIS should have undertaken, Complainant implicitly acknowledges and admits that, if CIS had incurred such expenses,

CIS would then have been a properly permitted TSD facility that could properly have engaged in the activity which Complainant contends, instead, violated RCRA.

Notwithstanding that Complainant would be made whole by imposition of such penalties, Complainant additionally demands that CIS disgorge the "profits" it made from its allegedly illegal activities, i.e., the purchase and sale of the IFF Unitene material and the JLM material. Complainant calculates this amount to be $212,637. It is here that the fundamental flaw in Complainant's penalty demand becomes apparent. Complainant cannot claim a penalty based on the theoretical costs of compliance which would have made the very activities of which it complains "legal," and then also demand that on top of such costs, CIS should also pay back the "illegal profits" that it made by engaging in those activities. Complainant, from an enforcement perspective, must choose one or the other. To award such "disgorgement" amounts to Complainant in the form of a penalty for would be to unfairly penalize CIS twice for the same behavior.

Because Complainant's "costs of compliance avoided/delayed" calculation would theoretically put CIS in the same position it would be if it had paid the appropriate costs and taken the required actions, Complainant's attempts to move beyond its BEN analysis, in this case is inappropriate. It unfairly penalizes CIS in comparison with its hypothetical compliant competitors. Therefore, no "Beyond BEN" penalties should be assessed in this case.

4. Even if Wrongful Profits Are Recoverable, Complainant's "Beyond BEN" Calculation is Flawed.

To the extent to which the Presiding Officer finds that some measure of recapture of so-called 'illegal profits' is nevertheless appropriate in this case, Complainant's "Beyond BEN" calculations suffer from similar and additional defects and errors as does

Complainant's BEN calculations. Accordingly, Respondents' expert Mr. McClure will testify as to these problems at hearing and, again, offer alternative calculations of an appropriate penalty.

Respectfully submitted,

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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, Lawrence W. Falbe, an attorney, hereby certify that the foregoing Respondents' Joint Prehearing Brief was sent on June 1, 2012, in the manner indicated, to the following:

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