



**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 MOTIONS FOR ACCELERATED DECISION

REDACTED – ORIGINAL CONTAINS CONFIDENTIAL BUSINESS INFORMATION

This proceeding arises under the authority of Section 3008(a)(1) and (g) of the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as “RCRA”), 42 U.S.C. § 6928(a)(1) and (g). The Complaint (or “Compl.”) was filed on May 13, 2011, and alleges, in 10 separate counts, that Carbon Injection Systems, LLC (“CIS”), Mr. Scott Forster, and Mr. Eric Lofquist (collectively “Respondents”) violated RCRA. The Complaint asserts violations of the following regulatory provisions:

- Count 1. 42 U.S.C. § 6925(a); 40 C.F.R. § 270.1, 270.10(a) and (d), and 270.13 [Ohio Administrative Code (“OAC”) equivalent: OAC §§ 3734.02, 3734.05, 3745-50-40 through 3745-50-66]. Compl. ¶¶ 51-53.
- Count 2. 40 C.F.R. § 124.31(b) [OAC §§ 3745-50-39(A)(2) and 3745-50-40(A)(2)(a)] Compl. ¶ 57.
- Count 3. 40 C.F.R. § 264.13(b) and (c) [OAC § 3745-54-13(B) and (C)]. Compl. ¶ 62.
- Count 4. 40 C.F.R. § 264.16(a)(1) and (d) [OAC § 3745-54-16(A)(1) and (D)]. Compl. ¶ 67.
- Count 5. 40 C.F.R. § 264.37(a) [OAC § 3745-54-37(A)]. Compl. ¶ 71.
- Count 6. 40 C.F.R. § 264.76 [OAC § 3745-54-76]. Compl. ¶ 77.

- Count 7. 40 C.F.R. § 264.110-120 [OAC §§ 3745-55-10 through 3745-55-20]. Compl. ¶ 81.
- Count 8. 40 C.F.R. § 264.142-143 [OAC §§ 3745-55-42 through 3745-55-43]. Compl. ¶ 86.
- Count 9. 40 C.F.R. § 264.192 [OAC § 3745-55-92]. Compl. ¶ 90.
- Count 10. 40 C.F.R. § 268.7 [OAC § 3745-270-07]. Compl. ¶ 95.

The parties in this matter have filed competing motions for accelerated decision, both of which have now been fully briefed. On March 16, 2012, Respondents submitted a Motion for Accelerated Decision and supporting memorandum (“Respondents’ MAD” or “Rs’ MAD”). Attached to Respondents’ MAD were five exhibits, which were the subject of a declaration by counsel for Respondents, Lawrence W. Falbe. Included with the Respondents’ MAD were four compact discs containing electronic versions of Respondents’ MAD, deposition transcripts¹ and exhibits from those depositions, cited authorities, six affidavits,² three expert reports,³ several exhibits from the parties’ prehearing exchange, and two letters from U.S. EPA responding to inquiries from regulated entities.

On April 2, 2012, Complainant filed its Response to Respondents’ Motion for Accelerated Decision (“Complainant’s Response” or “C’s Resp.”), and included several

¹ The transcripts are from the depositions of Ms. Theresa Barry (“Barry Deposition”), Mr. Donald DuRivage (“DuRivage Deposition”), Mr. Thomas Guido (“Guido Deposition”), and Mr. David Shepherd (“Shepherd Deposition”).

² The affidavits are from Mr. Eric Lofquist (“Lofquist Affidavit”), Mr. Scott Forster (“Forster Affidavit”), Mr. John Dzugan (“Dzugan Affidavit”), Mr. Richard Murray (“Murray Affidavit”), Mr. Robert Malecki (“Malecki Affidavit”), and Mr. Zygmunt Osiecki (“Osiecki Affidavit”).

³ The expert reports were authored by Mr. Frederick Rorick (addressing blast furnace operation) (“Rorick Report”), Dr. Bruce Sass (addressing the history of terpene hydrocarbons and the production of the Unitene materials) (“Sass Report”), and Mr. Christopher McClure (addressing the economic benefit component in Complainant’s proposed penalty calculation) (“McClure Report”). On April 2, 2012, Respondents were granted permission to attach supplemental declarations from each expert to his own expert report, certifying that all statements made in the expert report are true and correct, under penalty of perjury.

additional documents.⁴ On April 16, 2012, this Tribunal received Respondents' Reply to Complainant's Response to Respondents' Motion for Accelerated Decision ("Respondents' Reply" or "Rs' Reply"). Included with Respondents' Reply was a compact disc containing electronic versions of additional cases and authorities, regulations, a Supplemental Declaration of Christopher McClure ("McClure Declaration"), a Second Expert Rebuttal Report and Counter-Declaration of Bruce M. Sass ("Third Sass Report"), and a second affidavit by Mr. Scott Forster, dated April 12, 2012 ("Second Forster Affidavit").

On March 16, 2012, Complainant filed a Motion for Partial Accelerated Decision as to Liability along with a supporting memorandum ("Complainant's MAD" or "C's MAD"). The Motion also included several attachments.⁵ On April 4, 2012, this Tribunal received Respondents' Corrected Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision as to Liability ("Respondents' Response" or "Rs' Resp."). Included with Respondents' Response was a compact disc containing electronic versions of additional cases and authorities, regulations, guidance documents, federal register notices, and several affidavits and reports.⁶

On April 13, 2012, Complainant filed its Reply to Respondents' Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision ("Complainant's Reply" or "C's Reply"). This order addresses both Complainant's and Respondents' respective Motions for Accelerated Decision.

I. Statutory and Regulatory Background

Congress enacted RCRA in 1976 as an amendment to the existing Solid Waste Disposal Act of 1965 in response to findings that "disposal of solid waste and hazardous waste . . . without careful planning and management can present a danger to human health and the environment;"

⁴ The additional documents included: a First Supplemental Declaration of David D. Clark ("Second Clark Declaration"), a Supplemental Declaration of Richard J. Fruehan ("Second Fruehan Declaration"), and multiple EPA guidance letters.

⁵ The attachments consisted of: a declaration of David D. Clark ("Clark Declaration"), a declaration of Richard J. Fruehan ("Fruehan Declaration"), and a memorandum from K. Stein and B. Diamond to J. Barker and D. Guinyard (dated December 12, 1990).

⁶ The affidavits, reports, and declarations include: affidavit by Mr. David Shepherd ("Shepherd Affidavit"), an affidavit by Mr. Joseph Leightner ("Leightner Affidavit"), a second affidavit by Mr. Robert Malecki, dated April 2, 2012 ("Second Malecki Affidavit"), an Expert Rebuttal Report and Counter-Declaration of Bruce M. Sass ("Second Sass Report"), a declaration by Joseph J. Poveromo ("Poveromo Declaration"), and a declaration by Frederick Charles Rorick ("Rorick Declaration").

that “alternatives to existing methods of land disposal must be developed” due to a shortage of suitable disposal sites; and that methods to extract usable materials and energy from solid waste were available. 42 U.S.C. § 6901(b)-(d).

In view of these findings, Congress designed RCRA to include two foundational programs: one governing “solid waste,” the framework for which is set forth in Subtitle D of the statute, and one governing “hazardous waste,” the framework for which is set forth in Subtitle C. Codified at 42 U.S.C. §§ 6921-6939f, Subtitle C was crafted “to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, ‘so as to minimize the present and future threat to human health and the environment.’” *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). To achieve this goal, RCRA “empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous standards and waste management procedures of Subtitle C” *City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 331 (1994).

A. Definition of “Hazardous Waste”

While Subtitle C of RCRA directs EPA to “promulgate regulations establishing a comprehensive management system[,] EPA’s authority . . . extends only to the regulation of ‘hazardous waste.’” *American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) (“*AMC I*”). Section 1004(5) of RCRA defines the term “hazardous waste” in the following manner:

The term ‘hazardous waste’ means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may -- (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazardous to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

This definition clearly indicates that, in order for a material to constitute a “hazardous waste,” it must first qualify as a “solid waste” under the statute. *See AMC I*, 824 F.2d at 1179 (“Because ‘hazardous waste’ is defined as a subset of ‘solid waste,’ . . . the scope of EPA’s jurisdiction is limited to those materials that constitute ‘solid waste.’”). RCRA defines the term “solid waste,” in pertinent part, as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities” 42 U.S.C. § 6903(27) (emphasis added).

Consistent with the statute, the regulations promulgated by EPA to implement Subtitle C, found at 40 C.F.R. Parts 260 through 279,⁷ also define “hazardous waste” as a subset of “solid waste” and “solid waste” as “any discarded material.” See 40 C.F.R. §§ 261.3, 261.2(a)(1). These regulations were issued as part of an EPA Final Rule on January 4, 1985. “Hazardous Waste Management System; Definition of Solid Waste” (hereinafter “Final Rule”), 50 Fed. Reg. 614 (to be codified at 40 C.F.R. Parts 260, 261, 264, 265, and 266) (Jan. 4, 1985). While not defined by statute, the term “discarded material” is defined by the regulations, in relevant part, as including materials that are “[r]ecycled.”⁸ 40 C.F.R. § 261.2(a)(2)(i). The regulations further prescribe, in relevant part, that “[b]y-products (listed in 40 CFR 261.31 or 261.32),” “[b]y-products⁹ exhibiting a characteristic of hazardous waste,” and “[c]ommercial chemical products¹⁰ listed in 40 CFR 261.33”¹¹ are “recycled - or accumulated, stored, or treated before recycling” if

⁷ Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, EPA may authorize states to administer and enforce their own hazardous waste programs in lieu of the federal Subtitle C program. Section 3006(b) requires EPA to approve state programs found to 1) be the equivalent of the federal Subtitle C program; 2) be consistent with the federal Subtitle C program and the programs of other approved states; and 3) provide adequate enforcement. The requirements for authorization are set forth at 40 C.F.R. Part 271, and EPA codifies its authorization of state hazardous waste programs at 40 C.F.R. Part 272. The State of Ohio is so authorized. 40 C.F.R. § 272.1801. Accordingly, the operative regulations in Ohio, and for purposes of this proceeding, are those promulgated by the State and codified in the Ohio Administrative Code. However, citations in this Order will refer to the Code of Federal Regulations where they are substantially similar to the parallel provisions of the Ohio Administrative Code unless a party provides a citation only to the Ohio Administrative Code.

⁸ The regulatory definition of “discarded material” also includes materials that are “[a]bandoned,” “[c]onsidered inherently waste-like,” and “[a] military munition identified as a solid waste in [40 C.F.R.] § 266.202.” 40 C.F.R. § 261.2(a)(2)(i). Complainant has not alleged that the materials at issue in this proceeding fall within any of these categories of “discarded material.”

⁹ The term “by-product” is defined, for purposes of §§ 261.2 and 261.6, as “a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public’s use and is ordinarily used in the form it is produced by the process.” 40 C.F.R. § 261.1(c)(3).

¹⁰ The regulations carve out an exemption for listed commercial chemical products “if they are themselves fuels.” 40 C.F.R. § 261.2(c)(2)(ii).

¹¹ Section 261.33 identifies “materials or items [as] hazardous wastes if and when they are discarded or intended to be discarded as described in § 261.2(a)(2)(i), . . . when, in lieu of their

they are “[b]urned to recover energy”¹² or “[u]sed to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste).” 40 C.F.R. § 261.2(c) and Table 1 of that regulation.¹³

The regulations set forth exclusions from this definition of “discarded material” for materials that are recycled by being: “[u]sed or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed” or “[u]sed or reused as effective substitutes for commercial products[.]” 40 C.F.R. § 261.2(e)(1). However, this exclusion does not apply to materials that are “burned for energy recovery, used to produce a fuel, or contained in fuels” “even if the recycling involves use [or] reuse” as described in subsection 261.2(e)(1). 40 C.F.R. § 261.2(e)(2).

B. Definition of “Operators”

Section 3005(a) of RCRA requires the EPA to promulgate regulations applicable to “owners and operators” of existing or planned facilities that treat, store, or dispose of hazardous waste. 42 U.S.C. § 6925(a).¹⁴ The implementing regulations define “operator” as “the person responsible for the overall operation of a facility.” 40 C.F.R. § 260.10. While the rules do not elaborate further on the definition or its application, several courts have considered this issue. In *Southern Timber Prods., Inc. D/B/A/ Southern Pine Wood Preserving Co., and Brax Batson* (“*Southern Timber II*”), 3 E.A.D. 880 (EAB 1992), the Environmental Appeals Board (“EAB”)

original intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel.” 40 C.F.R. § 261.33. Paragraphs 261.33(e) and (f) set forth extensive lists of chemicals and include the Hazardous Waste Number, Chemical Abstracts Number, and Substance name of each. 40 C.F.R. § 261.33(e)-(f). Paragraphs (a)-(c) bring within the scope of § 261.33 chemicals (including off-specification chemicals and residues from non-RCRA-empty containers that held chemicals) having a generic name listed in paragraphs (e) or (f). 40 C.F.R. § 261.33(a)-(c).

¹² The regulations do not define the phrase “burned for energy recovery.”

¹³ The regulatory definition of “recycled” materials also contemplates disposal by application to the land. 40 C.F.R. § 261.2(c)(1). Complainant has not alleged that the materials at issue in this proceeding fall within this category.

¹⁴ 40 C.F.R. Part 264 applies to “owners and operators.” 40 C.F.R. § 264.1(b). 40 C.F.R. Part 268 applies to persons who generate or transport hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities. 40 C.F.R. § 268.1(b). 40 C.F.R. Part 124 Subpart B applies to all RCRA hazardous waste management facilities. 40 C.F.R. § 124.1(b). 40 C.F.R. § 124.31 applies to all RCRA part B applications seeking initial permits, renewal of permits, or standardized permits for hazardous waste management units. 40 C.F.R. § 124.31(a).

conducted a review of the relevant cases and concluded that “operator” status should be found where an officer exercises “active and pervasive control over the overall operation of the facility.” *Southern Timber II* at 895-96. In order to determine whether an officer exercises “active and pervasive control” the EAB considers a host of factors including the officer’s:

- role in the corporation;
- percent of stock ownership in the corporation;
- authority to hire, fire, and control employees;
- degree of presence at the facility;
- involvement in the activity at issue;
- authority in making financial decisions for the facility;
- involvement and authority in decision making as to the facility’s operation and compliance with laws and regulations at issue;
- authority and control over the facility;
- authority in making decisions as to consultants;
- delegation of responsibility to others;
- documents submitted to EPA identifying the individual as facility operator and not just corporate representative; and
- personal liability under a lease at the facility.

3 E.A.D. at 891-98 (citing *Wisconsin v. Rollfink*, 475 N.W.2d 575 (Wis. 1991); *United States v. Env’tl. Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989), *aff’d*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *United States v. ILCO, Inc.*, 32 Env’t. Rep. Cas. (BNA) 1977 (N.D. Ala. 1990)).

II. Factual Background

On April 9, 2012, the parties filed Joint Stipulations as to Facts, Exhibits and Testimony (“Joint Stipulations” or “Jt. Stips.”). The Joint Stipulations set forth the following relevant facts:

1. Respondent CIS was formed in August 2004 as an Ohio limited liability company and since that time Respondent Scott Forster has been its President and Respondent Eric Lofquist has been its Vice President. Respondents stipulate that they are “persons” under the relevant regulations. Jt. Stips. at 6.
2. A facility was constructed at Gate #4 Blast Furnace Main Avenue in Warren Township, Ohio in late 2004 (“the Facility”). [REDACTED] Shortly thereafter CIS notified Ohio EPA of its status as a used oil processor and marketer pursuant to 40 C.F.R. § 279.42. *Id.*
3. The Facility consisted of ten 20,000 gallon, vertical, above-ground tanks connected by

piping to an eleventh above-ground tank called the “day tank.” Material would arrive at the Facility and be loaded into one of the ten storage tanks. The day tank fed the blast furnace operated by WCI. The blast furnace was idled and WCI stopped purchasing material from CIS in October 2008. *Id.* at 7.

4. One shipment of “Residue Column Bottoms” was shipped from JLM Chemicals, Inc. (“JLM”), to CIS on November 21, 2005. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] *Id.*

The Joint Stipulations also set forth several facts related to the production process for Unitene LE and Unitene AGR (the “Unitene materials”). *Jt. Stips.* at 10-12. The narrative description set forth in these facts are, in large part, represented by the various flow diagrams submitted by the parties for consideration in connection with the instant motions. These diagrams can be found in Deposition Exhibit 2 (Complainant’s Bates No. 10048), Deposition Exhibit 3 (Complainant’s Bates No. 6927), and Figure 1 of the Sass Report. These diagrams are all illustrations generated by Respondents or their expert.

In addition, while not explicitly stipulated to by the parties, there are several facts of import which do not appear to be in dispute.¹⁵ For example, the parties agree that CIS is an owner and operator of the facility and that Respondents Lofquist and Forster are not *owners* of the facility, but dispute whether Respondents Lofquist and Forster are “operators” under RCRA. *See* Rs’ MAD at 62-63 n.17; C’s MAD at 57. In addition, Respondents admit that they did not apply for or obtain a RCRA Subtitle C Permit, pursuant to 42 U.S.C. § 6925(a), but they maintain that no such permit was required. Amended Answer (“Ans.”)¹⁶ at ¶ 50; *see* C’s MAD at 56. Further, while not explicitly conceding the issue, Respondents do not argue that the November 2005 shipment from JLM did not consist of “hazardous waste” as that term is defined in RCRA. *See* Rs’ MAD at 77, 79 (*conditionally* conceding that CIS did store “a single test shipment of K022 listed hazardous waste” which “would be waste” if it was determined to have been burned for energy recovery). Moreover, while Respondents dispute the assertion that they engaged in the “treatment” of materials, they concede that CIS did temporarily store in its receiving tanks the products it purchased. Rs’ Resp. at 2 n.1. On the other hand, although not explicitly argued, Respondents appear not to admit that the IFF materials would be considered

¹⁵ Should any party believe that this Tribunal has misinterpreted its factual or legal contentions or admissions, or disagree with the legal analytical framework set forth herein, it should note this in its Pre-Hearing Brief.

¹⁶ On April 20, 2012, Respondents submitted their Answer to U.S. EPA’s First Amended Complaint and Compliance Order (“Amended Answer”). The Amended Answer replaces the initial Answer in its entirety and references to the “Answer” will mean the Amended Answer unless otherwise noted.

hazardous if determined to be solid waste. Rs' MAD at 77-80.

III. Arguments of the Parties

Complainant's MAD addresses only liability and requests an order finding all three Respondents liable as to all counts in the Complaint, but leaves the issue of penalty to be addressed at hearing. C's MAD at 82. Respondents' MAD seeks an order with the following rulings: (1) that the Unitene materials are not waste under RCRA; (2) that the materials from IFF and JLM were both either ingredients or commercial product substitutes, and therefore not discarded; (3) alternatively that the materials were themselves fuel, not waste, and thus burning them was acceptable under RCRA; (4) neither Scott Forster nor Eric Lofquist are individually liable as operators; (5) Complainant is not entitled to recover the economic benefit component of its proposed penalty (as calculated by the Beyond BEN Model); and (6) the temporary storage of the JLM material is an insufficient basis for Complainant to assess a multi-day penalty component. Rs' MAD at 82.

The briefings on the competing motions address many of the same issues and arguments, in some instances presenting the identical language to address a repeated issue. The disputes between Complainant and Respondents can be distilled into five general areas.

- A. Whether Respondents "treated" the allegedly hazardous waste. *See* 42 U.S.C. § 6903(32); 40 C.F.R. § 260.10.
- B. Whether the materials shipped from IFF were "solid wastes." *See* 40 C.F.R. § 261.2 [OAC § 3745-51-02]. Whether the materials shipped from IFF were "fuels" or otherwise excluded by the regulations. *See* 40 C.F.R. § 261.4(a)-(b) and 261.2(c)(2). Whether the materials shipped from JLM and/or IFF were "burned for energy recovery." *See* 40 C.F.R. § 261.2(c).
- C. Whether Respondents Forster and Lofquist are individually liable as "operators." *See* 42 U.S.C. § 6925(a); 40 C.F.R. § 260.10.
- D. Whether Respondents have sufficiently raised a fair notice defense with respect to the November 2005 shipment of materials from JLM.
- E. Whether it is permissible for Complainant to pursue certain components of the proposed penalty related to economic benefit and the multi-day penalties.

The arguments by the parties addressing each of these issues are set forth below in sequence.

A. "Treatment" of hazardous waste

Complainant asserts that both the JLM and IFF materials received at the CIS Facility were “treated” because they were “blended with used oil prior to entering the ‘day tank,’” thus changing the “character or composition” of the material “so as to recovery [sic] energy or material resources from the waste, or so as to render such waste . . . amenable for recovery.” C’s MAD at 54-55 (citing 42 U.S.C. § 6903(32), 40 C.F.R. §§ 260.10, 264, 265, 267, 270, 266.101(c), and EPA guidance documents found at Complainant’s Proposed Exhibit (“CX”) 95). This conclusion is based on Complainant’s interpretation of information provided by CIS, WCI Steel, and EPA’s own inspection report. *See* C’s MAD at 54-55 (citing CX 2, 5, 24, 29, and 46).

Respondents argue that activities at the Facility are more accurately described as “consolidation or bulking of compatible materials[, which] does not constitute treatment . . . even if it results in some incidental change in the material.” Rs’ Resp. at 3-4 (citing several letters that appear to be issued by EPA’s Office of Solid Waste in response to inquiries from regulated or potentially regulated entities). Respondents then describe why the particular characteristics of the Facility bring their activities within the scope of these letters, asserting that CIS has no “treatment equipment,” that the materials at issue were suitable “‘as-is’ and did not require any treatment to change their physical or chemical composition or to render them amenable for use in the blast furnace.” Rs’ Resp. at 5 (citing Poveromo Declaration at 10; Rorick Declaration at 7-8; and Second Malecki Affidavit at ¶¶ 4-5). Respondents also highlight several factual assertions that they argue Complainant “conveniently ignores” including a statement in EPA’s inspection report that “no dewatering or other similar processing occurs at the site [and] CIS only takes in finished product.” Rs’ Resp. at 5 (quoting CX 29 at EPA 16814) (internal quotations omitted). Respondents also dispute Complainant’s statement regarding water content in the material and whether the materials were altered to meet specifications for WCI Steel. *Id.* at 6. Respondents conclude that “there are disputed issues of material fact regarding whether CIS engaged in treatment.” *Id.* at 7.

In its Reply, Complainant argues that Respondents have already admitted that CIS engaged in blending used oil streams. C’s Reply at 3 (citing Ans. at ¶ 17; CX 5 at EPA 6063; CX 24 at EPA 13135-37; and CX 29 at EPA 16814). Complainant then points to EPA guidance, which explicitly states that “fuel blending is not exempt from regulatory standards or permitting.” *Id.* (citing CX 95 at EPA 18547). Complainant then attempts to differentiate the current situation from the scenarios described in each of the letters cited in Respondents’ Response. *Id.* at 4-6. Complainant maintains that the letters cited by Respondents involve repackaging for efficient transportation or transfer whereas CIS was engaged in “fuel blending” in order to meet the specifications set forth in its contract with WCI Steel. *Id.* at 5-6; *see also* Ans. at ¶ 17 (CIS engaged in “blending used oil to meet specifications”).

This issue is not directly addressed in the briefing on Respondents’ MAD.

B. Whether materials shipped from IFF were “solid wastes”

1. Complainant’s Position

Complainant maintains that there is no genuine issue as to whether the Unitene materials acquired by CIS were “waste.” C’s MAD at 16 (citing OAC § 3745-51-02; 40 C.F.R. § 261.2). Complainant argues that the Unitene materials were regulated wastes because they were recycled by being burned for energy recovery, which meets the definition of being discarded. *Id.* However, in order to meet the regulatory definition of “recycled material burned for energy recovery,” the materials must appear with an asterisk in Column 2 of the Table contained in 40 C.F.R. § 261.2(c) (i.e., they must be by-products or commercial chemical products listed in the regulations). *Id.* at 16-17.

Complainant argues that the IFF materials are by-products because they are “(1) generally of a residual character; (2) not produced intentionally or separately; and (3) unfit for end use without substantial processing.” C’s MAD at 18 (citing *Breentag Great Lakes, LLC* (“*Breentag*”), EPA Docket No. RCRA-05-2002-0001, 2004 EPA ALJ LEXIS 18, at *40-41 (ALJ, June 2, 2004) (quoting 50 Fed. Reg. at 625)); *see also* C’s Reply at 7-9 (citing CX 9; CX 11; CX 161; and Second Clark Declaration at ¶ 6) ([REDACTED]). Complainant then describes IFF’s production processes and offers the opinions of its expert witness as to why the material streams that become Unitene LE and Unitene AGR are by-products and not co-products. C’s MAD at 18-21 (citing CX 9; CX 11; CX 143; CX 161; CX 162; CX 164; and the Clark Declaration). Complainant then goes into greater detail in describing the specific reasons why Unitene LE and Unitene AGR are each by-products. *Id.* at 21-35; *see also* C’s Reply at 9-16 (again discussing the *Breentag* factors and likening Unitene to the incidental creation of sawdust in a woodshop). Complainant disputes Respondents’ reliance on five EPA guidance letters, arguing that the regulatory definition of “by-product” explicitly includes “distillation column bottoms,” [REDACTED]. C’s Resp. at 9-13 (citing CX 11; CX 161; and the Clark Declaration). If, Complainant continues, additional factors must be analyzed to determine the regulatory status of Unitene, application of the seven factors identified by Respondents, Rs’ MAD at 37-38, weigh in favor of Complainant’s conclusion that Unitene is a by-product. C’s Resp. at 14-24.

In the alternative, Complainant argues that if the IFF materials are deemed to be products (or co-products) and not by-products, then they are commercial chemical products. C’s MAD at 35. While Complainant concedes that neither Unitene LE nor Unitene AGR are listed in OAC § 3745-51-33 (the state equivalent to 40 C.F.R. § 261.33), Complainant argues that 1985 “technical corrections” to § 261.33 “clarified” that “non-listed commercial chemical products which exhibit one or more of the hazardous waste characteristics” “are considered solid wastes only when ‘recycled in ways that differ from their normal manner of use.’” C’s MAD at 36 (quoting “Hazardous Waste Management System; Definition of Solid Waste; Corrections,” 50 Fed. Reg. 14,216, 14,219 (Apr. 11, 1985)). *See also* C’s Resp. at 24 (quoting OAC § 3745-51-33 [40 C.F.R. § 261.33]) (“commercial chemical products are hazardous waste ‘when, in lieu of their original intended use, they are produced for use as (or as a component of) a fuel, distributed for

use as a fuel, or burned as a fuel.”¹⁷ [REDACTED]
[REDACTED] C’s Resp. at 24 (citing CX 162 at EPA 024868, 025289, 025370-71, 025423-24).¹⁸

With respect to the issue of “burning for energy recovery,” Complainant first describes how a steel mill blast furnace works, with multiple and detailed citations to the Fruehan Declaration. C’s MAD at 37-40. Complainant concludes that “CIS’s oil fuel, blended with hazardous waste from IFF, was burned in WCI Steel’s furnace for energy recovery within the meaning of OAC § 3745-51-02(C)(2)(a) and consistent with this description of blast furnace operations.” *Id.* at 40. Complainant argues that the IFF materials act as “fuel injectants [which] provide approximately 22% of the heat input to the blast furnace.” C’s MAD at 41 (citing 50 Fed. Reg. at 49,172). Complainant argues that while Respondents may assert that a portion of the IFF materials are “used or reused” as ingredients or effective substitutes, as described in 40 C.F.R. § 261.2(e)(1), “this assertion ignores the energy that the fuel provides to the column upon initial combustion.” *Id.* (citing Fruehan Declaration at ¶ 27). *See also* C’s Resp. at 26 (citing Second Fruehan Declaration at ¶ 21) (“The idea that in the iron making process energy is ‘chemically bonded’ to the hot metal is not consistent with fundamental thermodynamics.”). In its Response, Complainant offers a detailed explanation of the chemical energy balance in a blast furnace, concluding that “the carbon in the injected oil does not enter the iron” and, therefore, neither Unitene nor the JLM material can be considered “ingredients in an industrial process” or “effective substitutes for commercial products” under 40 C.F.R. § 261.2(e)(1). C’s Resp. at 30-31 (citing Second Fruehan Declaration at ¶¶ 18-21).¹⁹ Complainant also resists Respondents’

¹⁷ Complainant disputes Respondents’ reading of the Commercial Chemical Products regulation, which begins “[t]he following materials or items are hazardous wastes” C’s Reply at 31 (quoting OAC § 3745-51-33 [40 C.F.R. § 261.33]). Complainant asserts that Respondents’ reading improperly treats the word “discarded” as modifying each clause of the leading paragraph, thereby creating a second “discarded” requirement for the Agency to demonstrate before asserting jurisdiction over a commercial chemical product. *Id.* Instead, Complainant argues, the phrase “discarded or intended to be discarded” is limited only to the first comma-delimited clause; subsequent clauses, such as “when, in lieu of their intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel,” are separate categories of commercial chemical products that are deemed to be hazardous wastes if they are found in the subsequent paragraphs of § 261.33. *Id.* at 31-32.

¹⁸ In its Reply, Complainant asserts an alternative argument that “even if” Unitene is not a regulated by-product or commercial chemical product, [REDACTED]

[REDACTED]. C’s Reply at 33.

¹⁹ Complainant also criticizes the report on which Mr. Rorick relies because it was purposely written “to protect the steel industry in the European Union from carbon taxes” and urges the undersigned to accept the EPA’s Cadence discussion instead. C’s Resp. at 34 (citing

reference to the preamble of the proposed rule, 48 Fed. Reg. 14472, 14485 n.19 (April 4, 1983), as an attempt to “turn back time” and take advantage of language that is conspicuously absent from the Final Rule’s preamble. C’s Reply at 20-21 and 29.²⁰ Instead, Complainant argues that the language in the preamble to the Final Rule “makes clear” that injectants burned for the dual purpose of energy and material recovery remain regulated as solid waste. *Id.* at 27-28 (quoting Final Rule at 630-31).

[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 42-43 (quoting CX 24 at EPA 13139); C’s Resp. at 27-28 n.15. Moreover, [REDACTED] *Id.* As further evidence that the IFF materials were “burned as a fuel,” Complainant argues that the [REDACTED]
[REDACTED]
[REDACTED]. C’s MAD at 44-46 (citing CX 13; CX 24; and CX 47).

Finally, Complainant argues that there is no genuine issue of material fact that the “used or reused” exclusion, set forth in 40 C.F.R. § 261.2(e)(1), does not apply to either the JLM or the IFF materials because they are burned for energy recovery. C’s MAD at 47 (citing 40 C.F.R. § 261.2(e)(2)). Complainant also cites the preamble to the Final Rule for the proposition that “all secondary materials . . . are considered to be wastes when they . . . are burned for energy recovery or used to produce a fuel” *Id.* at 47 (citing Final Rule at 619). Similarly, according to Complainant, the exclusion does not apply when “spent materials, by-products, sludges or scrap metal are used as ingredients in waste-derived fuels . . .” *Id.* at 48 (quoting same).²¹

Second Fruehan Declaration at ¶ 23).

²⁰ While Complainant’s reference to the immortal Ms. Sarkisian is well taken, the undersigned suggests, given the complexity of the disputes in this matter as evidenced by the volume of competing declarations, that analogy to Ms. Tisdale’s “He Said She Said,” although less iconic, would seem to be more appropriate.

²¹ Complainant also notes that a number of materials are explicitly excluded from the definition of solid waste (and a number of solid wastes are explicitly excluded from the definition of hazardous waste). C’s MAD at 52-53 (citing 40 C.F.R. § 261.4(a)-(g)). However, Complainant asserts that none of the materials at issue in this case are listed in these paragraphs. *Id.* Complainant goes on to observe that an exclusion for “comparable fuel solid waste” might have been applicable if the generators had taken steps to satisfy the exclusionary requirements, but concludes that neither IFF nor JLM met these requirements. *Id.* at 53 (citing 40 C.F.R. §§ 261.4(a)(16) and 261.38(a)-(b)).

In its Response, Complainant addresses Respondents' alternative contention that Unitene (whether LE or AGR) is a fuel and therefore exempt from RCRA when burned for energy recovery. C's Resp. at 36. Recognizing the absence of any relevant case law on the matter, Complainant offers a brief survey of Federal Register notices and EPA communications to support its contention that Unitene is unlike any other recognized "fuel" (such as off-specification gasoline, jet fuel, diesel, etc., or other "benchmark" fuel). C's Resp. at 37-38. Then, Complainant sets forth a list of factors that EPA considers when deciding whether a material is a fuel under 40 C.F.R. § 261.2(c)(2)(ii) and then proceeds to apply them to the present case, concluding that Unitene is not a fuel. C's Resp. at 38-39 (citing RX 87; attached letters).

2. Respondents' Position

As Respondents note, Complainant bears the burden of proving that Unitene AGR and Unitene LE are solid wastes under RCRA. Rs' Reply at 3. By contrast, Respondents argue that they need only prove that they fall within an exclusion or exemption from the definition of either solid or hazardous waste. *Id.* at 3-4. Respondents argue that Unitene is not "recycled" because it is a product or co-product and not a by-product. Rs' MAD at 34-36 (citing 40 C.F.R. § 261.1(c)(3)); Rs' Resp. at 7-8. Recognizing that the regulations do not directly define "co-product," Respondents refer to the preamble to the Final Rule for support of the proposition that co-products are "materials produced intentionally, and which in their existing state are ordinarily used as commodities in trade by the general public." *Id.* at 36 (quoting 50 Fed. Reg. at 625). Respondents argue that whether a material is a co-product or a by-product, under RCRA, requires a "case-by-case determination" and then analogize the Unitene materials to several example co-products identified in the preamble. *Id.* (citing Sass Report at 4-9); *see also* Rs' Resp. at 12 (agreeing with Complainant's set of "relevant criteria" for determining whether a material is a by-product); Rs' Reply at 9-12 (arguing again that IFF intended to produce Unitene and Unitene is not residual in character). Respondents challenge the Clark Declaration, relied upon by Complainant, and counter with the Leightner Affidavit and the Second Sass Report, *see* Rs' Resp. at 13-20, followed by additional arguments with some citations to the deposition testimony; *Id.* at 21-26.

Respondents go on to cite several letters from EPA in which the Agency determines whether a material in question is a co-product or by-product. Respondents then compare Unitene to these other materials. *Id.* at 38-41 (citing RX 34-37 and the July 9, 1992, letter attached to Rs' MAD). [REDACTED]

[REDACTED]. Rs' Resp. at 8-11 (citing Shepherd Affidavit at ¶¶ 6-10). In their Reply, Respondents argue further that it is permissible under RCRA for a company to take material streams that it is already producing (and discarding as waste) and use them as feedstock to produce new useful products (and subsequently sell them outside the scope of RCRA) without requiring major capital projects. Rs' Reply at 12-13. Otherwise, Respondents submit, EPA cannot achieve the "dual goal of conservation of resources and proper management of wastes."

Id. at 13.

With respect to the alternative “commercial chemical products” argument, Respondents’ assert that because 40 C.F.R. § 261.33 is titled “Discarded commercial chemical products . . .” that it only applies to commercial chemical products that are “discarded for some reason and no longer used for their original purpose . . .” R’s MAD at 42 (citing a letter from EPA dated Nov. 28, 1990, which states “EPA views commercial chemical products as non-wastes until a decision is made to discard them.”). Respondents argue that by asserting jurisdiction over the Unitene materials, Complainant has improperly substituted “its arbitrary judgment as to what it considers ‘normal’ use of the product . . .” *Id.* at 42. Respondents pursue this line of reasoning in greater detail in their Response, arguing that it is “impossible” to “characterize the Unitene products as being ‘discarded’ in any normal sense of the word, which U.S. EPA itself has acknowledged simply means ‘thrown away.’” Rs’ Resp. at 35 (citing Final Rule at 627). According to Respondents, Unitene was a “new, unspent material, that was not a waste, and not discarded.” *Id.* Respondents argue that Complainant lacks the authority and expertise to determine the “normal” use of a product. *Id.* at 36.

On the subject of burning for energy recovery, Respondents offer the following analytical framework:

Materials are not wastes when they can be shown to be recycled by being used as ingredients in an industrial process to make a product, provided the materials are not being reclaimed, or used as effective substitutes for commercial products, so long as they are not burned for energy recovery, used to produce a fuel or contained in fuels.

R’s MAD (citing 40 C.F.R. § 261.2(e)). Respondents initially assert that carbon is an essential ingredient for making iron in a blast furnace. *Id.* at 44 (citing Rorick Report at 8; CX 2; CX 19; and RX 47). Respondents then argue that the “liquid hydrocarbons” CIS purchased from *both* JLM and IFF are effective substitutes for coke in the iron production process because the material is “essentially equivalent . . . you [don’t] use twice as much to get the same result [and there are no] toxics along for the ride.” *Id.* at 45 (quoting *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2007 WL 2285352 (ALJ, July 24, 2007)).²²

Respondents then turn to the definition of “burned for energy recovery” and argue that the

²² Respondents offer the opinion of their expert witness, Mr. Rorick, for the proposition that the replacement ratio of the IFF and JLM materials to coke was “greater than one.” *Id.* at 45 (citing Rorick Report at 16). *See also* Lofquist Affidavit at ¶¶ 14, 20; CX 2 at EPA 2793-94). Respondents then assert that the JLM materials “contain no metals or inorganic impurities.” *Id.* at 46.

Id.

dual purpose of injecting the IFF and JLM materials into the blast furnace (i.e., both to recover material values and energy) renders the present situation different from other instances where EPA has regulated furnace-injected materials as hazardous wastes. Rs' MAD at 47. Respondents argue that EPA acknowledged this concept in the preamble to another final rule where it states that "there are certain situations where control of burning for material recovery in industrial furnaces could lead to an impermissible intrusion into the production process and so be beyond EPA's authority under RCRA." *Id.* at 48 (quoting "Hazardous Waste Management System; Burning of Waste Fuel and Used Oil in Boilers and Industrial Furnaces," ("Waste Fuel Rule") 50 Fed. Reg. 49164, 49167 (Nov. 29, 1985) (internal quotations omitted)); *see also* CX 2 at EPA 2837-38 (letters from EPA applying the exclusion). Respondents argue further that the regulations contemplate "thermal treatment" in a blast furnace to accomplish "recovery of materials," *id.* at 48-49 (quoting 40 C.F.R. § 260.10), but assert that EPA's current regulatory approach admits of only two possible purposes for material injected into a blast furnace: destruction or energy recovery. *Id.* at 49.²³ Respondents argue that this ignores the valid purpose of material recovery and assert that the "total energy balance of the furnace shows that the energy from carbon is either chemically bound to the hot metal (70%), or is simply lost, not recovered, to top gasses, hot slag and the furnace walls." *Id.* at 50 (citing Rorick Report at 12).²⁴ *See also* Rs' Resp. at 30-32 (citing the Poveromo Declaration and the Rorick Declaration for the proposition that a modern blast furnace "is not, in fact, a combustion device."). Moreover, Respondents argue, the operator of a blast furnace "must increase hot blast temperatures . . . to compensate for the 'chilling' effect of the injectants" reaction of which is "overwhelmingly endothermic . . ." Rs' Resp. at 32 (citing Poveromo Declaration at 4-8). Respondents conclude that Complainant's theory is based on "outdated science and manufacturing technology" and should be rejected. *Id.* at 33.²⁵

²³ In their Response, Respondents argue that Complainant has improperly interpreted the exclusion to apply only to materials burned "solely" for material recovery, arguing that the word "solely" is not found in 40 C.F.R. § 261.2(e)(2). Rs' Resp. at 30. Complainant's arguments in its Reply are not premised on the word "solely" appearing in the regulation. *See* C's Reply at 20-30.

²⁴ Separately, Respondents also attempt to distinguish the Cadence Product 312 from the materials at issue here. Unlike Cadence Product 312, which was "inherently waste-like," a "blend of spent solvents generated by others," and "contained up to 5% chlorinated solvents," the IFF and JLM materials here were "produced in a controlled manufacturing process, were handled and transported as valuable commercial products, and were tested prior to shipment." Rs' MAD at 51-52. As a result, the materials in this case "do not contain metals or inorganic impurities and do not consist of a blend of wastes from a variety of generators." *Id.* (citing Sass Report at 10).

²⁵ Seeming to sense the complexity of this particular issue, Respondents state as an alternative that "the factual dispute evidenced by the differing opinions" of the parties' experts "preclude[s] the entry of an accelerated decision at this time." Rs' Resp. at 34. *See also* Rs' Reply at 14 (noting the disagreement among the experts yet attempting to bolster the credibility

Respondents next address their alternative argument that, even if they were burned for energy recovery, the Unitene materials are not regulated because they are themselves fuels. Rs' MAD at 53-54. Respondents then quote from a letter from the EPA dated November 25, 1992, which states with respect to commercial chemical products:

when used as fuels, commercial chemical products listed in 40 CFR 261.33 are not solid wastes if they are themselves fuel. The same logic applies to commercial chemical products that are not specifically listed, but that exhibit a hazardous characteristic. Although the April 11, 1985 technical correction notice could be read to imply that commercial chemical products burned for energy recovery are wastes, please be assured that a commercial chemical product normally used as a fuel (such as gasoline) is considered to be used in a manner consistent with its normal product use if it is burned for energy recovery or used to produce a fuel. Thus, it would not be a waste [see 40 CFR 261.2(c)(2)(ii)].

Id. at 54 (quoting RX 90). Respondents then offer a policy argument for this distinction and conclude that Unitene contain none of the contaminants of concern to EPA. *Id.* at 55 (citing Sass Report at 11). Respondents argue, with reference to certain examples, that Unitene sufficiently resembles other materials that EPA has determined to be "fuels," if non-traditional ones. *Id.* at 55-57 (citing RX 37; CX 56 at EPA 17218-29; RX 87). Respondents also argue that Complainant has acknowledged that the materials in question are fuels, both directly in its arguments related to burning and indirectly in its comments on the availability of the 'comparable fuels' exclusion. Rs' Resp. at 37-38; *see also* Rs' Reply at 16-17.

C. Individual Liability of Mr. Lofquist and Mr. Forster as "Operators"

The parties do not dispute that Complainant must establish that Respondents Lofquist and Forster were "operators" of the CIS facility before individual liability for the alleged violations can attach. Rs' MAD at 62; C's MAD at 57. Although Complainant discusses a number of cases that it argues discuss what constitutes an "operator" under RCRA, Complainant focuses (as do Respondents) on the factors articulated by the EAB in *Southern Timber II* where it applied the "active and pervasive control" standard to a respondent alleged to have violated Part 265 of the RCRA rules. *Southern Timber II*, 3 E.A.D. at 895-900. Complainant sets forth a lengthy list of the factors that the EAB considered in determining whether the individual corporate officer in *Southern Timber II* was an "operator" for purposes of RCRA liability. C's MAD at 59 (citing 12 factors from the *Southern Timber II* decision). Complainant goes on to apply these factors to Respondent Forster, arguing that he exercised active and pervasive control over the CIS facility because he:

█ [REDACTED]

of the expert in the context of the brief).

[REDACTED]

C's MAD at 59-66 (citing extensively to Complainant's proposed exhibits). Complainant then goes on to apply these factors to Respondent Lofquist, advancing the same conclusion based on the factual assertions that Mr. Lofquist:

[REDACTED]

C's MAD at 66-71 (citing extensively to Complainant's proposed exhibits). Complainant concludes that "there is no genuine issue of material fact that both Forster and Lofquist exercised active and pervasive control over facility operations and are therefore liable as operators under RCRA." *Id.* at 70.

In its Response, Complainant emphasizes that *Southern Timber II* explicitly acknowledges the possibility that a facility may have more than one operator. C's Resp. at 43.

[REDACTED] *Id.* at 45
(citing CX 2). [REDACTED]
." *Id.* [REDACTED]. *Id.* at 45-48

(citing CX 2; CX 29 at EPA 16814; CX 45 at EPA 17137-44; CX 87 at EPA 18469-73).

[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 47-48 (citing Rs' MAD at 68). [REDACTED]
[REDACTED]
[REDACTED] *Id.* at 48. Complainant then cites multiple documents to support the contention that testimony "is likely" to demonstrate that Respondents Forster and Lofquist had "active involvement" in the "handling of hazardous waste. . ." *Id.* at 48-54 (citing numerous proposed exhibits). In its Reply, Complainant offers another assessment of the case law and repeats its view of the facts. C's Reply at 33-40.

Respondents argue that "it should be concluded as a matter of law that neither Eric Lofquist [n]or Scott Forster w[as] [an] operator[]" of the CIS facility." Rs' MAD at 68.

[REDACTED]
[REDACTED] *Id.* [REDACTED]
[REDACTED] *Id.* By contrast, Respondents Forster and Lofquist "performed the functions typical of high level officers of a company" and neither had "sole authority" to make financial decisions or engage consultants. *Id.* Moreover, aside from three to four occasions in the course of a year, neither was physically present at the facility. *Id.* Respondents cite no evidence to support these arguments.²⁶

In their Response, Respondents take issue with Complainant's focus on participation in the alleged storage and treatment of hazardous waste, arguing that such involvement is not "a criterion for establishing individual liability." Rs' Resp. at 39. Respondents argue that Complainant's "reliance on the Stein/Diamond Memo" (Attachment C to C's MAD) should be rejected as it was in *Southern Timber II*. *Id.* (citing *Southern Timber II*, 3 E.A.D. at 902). Instead, Respondents urge that the inquiry should consider a wider scope of activities and conclude that Complainant has overstated its evidence. *Id.* at 40. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 40-41. [REDACTED]
[REDACTED]
[REDACTED]

²⁶ Respondents dispute Complainant's contention that third-party witnesses will testify to the active involvement of Respondents Forster and Lofquist in the handling of hazardous waste at the facility. Rs' MAD at 69 (citing Complainant's Initial Prehearing Exchange at 4-8).

[REDACTED]
[REDACTED]
[REDACTED] Rs' MAD at 69-70 (citing DuRivage Deposition at 24, 93-94; Osiecki Affidavit at ¶ 9).

██████████ *Id.* at 42-43 (citing CX 2 at EPA 3187).

In their Reply, Respondents emphasize the “equal control” structure of CIS and argue that, “notwithstanding the original ownership percentages of the company on paper,” Respondents Lofquist and Forster operated CIS on an equal basis. Rs’ Reply at 20 (citing Lofquist Affidavit; CX 72). Respondents offer a more detailed argument against Complainant’s reliance on the “day tank” analyses signed by Mr. Lofquist, arguing that Complainant points to only 15 of the thousands of such reports to demonstrate pervasive involvement. *Id.* (no citations). Respondents also argue that Respondents Lofquist and Forster were acting as employees of a different company when they engaged in efforts to obtain regulatory approval for the various materials CIS considered selling to WCI Steel. *Id.* at 20-21 (citing Lofquist Affidavit; Forster Affidavit; Second Forster Affidavit; CX 72).

D. Fair Notice Defense

In their Response to Complainant’s Motion for Accelerated Decision, Respondents argue that they should not be “penalized for their good faith interpretation” of the “recycling rule” under the “fair notice doctrine.” Rs’ Resp. at 43. According to the Respondents, due process requires that parties receive fair notice from the government before being deprived of property. *Id.* (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Within the context of civil administrative enforcement, Respondents continue, the fair notice doctrine requires a court to consider whether “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform,” in which case the agency will have “fairly notified a petitioner of the agency’s interpretation” of its regulations. *Id.* at 44-45 (citing *Gen. Elec. Co. v. U.S. EPA* (“*General Electric*”), 53 F.3d 1324, 1329 (D.C. Cir. 1995) (U.S. EPA did not give fair warning of its interpretation of regulations where they and other policy statements were unclear and subject to disagreement within the agency). Respondents argue that the relevant inquiry must be made from the perspective of the regulated party at the time of the conduct at issue. *Id.* at 44 (citing *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224-30 (4th Cir. 1997).

Respondents assert this²⁷ fair notice defense in relation only to their November 21, 2005,

²⁷ Respondents previously raised a “fair notice” defense in their Answer. Ans. at 33. As Complainant notes in its Reply, this initial “fair notice” defense was stricken by the February 14, 2012, Order on Complainant’s Motion to Strike Affirmative Defenses (“Order on MTS”). Order on MTS at 6-7. However, the stricken defense was raised on largely different facts not now reasserted by Respondents. The argument raised in Respondents’ Response is, therefore, considered a new argument invoking the fair notice doctrine.

receipt of a single test shipment of phenol column bottoms from JLM.²⁸ They argue that they interpreted “the recycling exclusion” as “permitting the use of certain clean carbon-containing materials in a blast furnace as a substitute for coke notwithstanding that they otherwise would be hazardous wastes” because “[t]he rule, on its face, spoke to the purpose for which materials were burned, and did not contain the word ‘solely’ that U.S. EPA now claims should be read into the rule.” Rs’ Resp. at 46. Respondents rely on the following additional assertions: that U.S. EPA’s guidance on the issue (namely its initial indication that material burned both for material and energy recovery would not be regulated) was inconsistent with its later statement (regarding Cadence and the sham burning of low-BTU material); that the Louisiana Department of Environmental Quality (“LDEQ”) initially indicated that it agreed with Respondents’ interpretations (subject to Ohio EPA’s concurrence); and the fact that Respondents were not notified of Ohio EPA’s contrary interpretation until December 20, 2005, two months after receipt of the JLM materials.²⁹ *Id.* at 46-47. Respondents provide no citations to the record or other materials to support these assertions.

In their Reply, Respondents clarify that the inconsistent EPA interpretations to which they refer include the preambles to the proposed rule and Final Rule as well as guidance letters issued by the agency. Rs’ Reply at 22. Respondents conclude that despite acting in good faith, they were not able to identify with ascertainable certainty the standards with which they were expected to conform. *Id.*

Complainant also describes *General Electric* as articulating the standard for deciding a fair notice affirmative defense and quotes from the EAB’s decision in *Coast Wood Preserving* addressing this issue:

[P]roviding fair notice does not mean that a regulation must be altogether free from ambiguity. Indeed, the case law shows that even where regulatory ambiguity

²⁸ Respondents maintain that the IFF materials are products and not waste, and therefore the decision not to seek Ohio EPA’s determination as to the nature of the IFF materials does not undermine Respondents’ position with respect to the characterization of the IFF materials themselves, the ambiguity of the regulations, or Respondents’ standard procedures for dealing with potentially hazardous wastes. Rs’ Resp. at 47 n.15.

²⁹ [REDACTED]

exists, the regulations can still satisfy due process consideration. * * * Thus, the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community.

C's Reply at 41 (citing *Coast Wood Preserving, Inc.*, 11 E.A.D. 59, 81 (EAB 2003)). Complainant refers to the "leading" EAB case applying the fair notice standard, *Howmet Corp.* ("*Howmet*"), 13 E.A.D. 272 (EAB 2007), in which the EAB assessed the following four factors: the text of the regulations, the regulations as a whole, the regulatory history or agency interpretive guidance, and any respondent inquiries as to the meaning of the regulation at issue. *Howmet* at 303-09.

Regarding the text of the regulation, Complainant states that it does not read the word "solely" into the text of 40 C.F.R. § 261.2(c)(2)(I)(A), as Respondents assert, such that it reads "burned solely to recover energy." C's Reply at 42. Rather, Complainant argues that "burned to recover energy" includes materials burned solely for energy recovery *as well as* materials burned for both energy recovery and materials recovery. *Id.* at 42-43. With respect to the RCRA regulations as a whole, Complainant argues that its reading is consistent with the regulation defining solid waste as a whole and with EPA's overall approach in the RCRA regulatory scheme of caution when approving the burning of materials - particularly hazardous waste. *Id.* at 42 (citing EPA's RCRA Orientation Manual found at RX 88).

Regarding the regulatory history of the regulation and EPA's interpretive guidance, Complainant refers to the preamble to the Final Rule, which states:

The regulations would also apply when an industrial furnace burns the same secondary material for both energy and material recovery. Examples are blast furnaces that burn organic wastes to recover both energy and carbon values . . . These activities are not so integrally tied to the production nature of the furnace as to raise questions about the agency's jurisdiction. In addition, EPA believes that both the existing statute and the new legislation express a strong mandate to take a broad view of what constitutes hazardous waste when hazardous secondary materials are burned for energy recovery, and to regulate as necessary to protect human health and the environment.

Id. at 44 (quoting Final Rule at 630-31). Complainant includes in Attachment A to its Reply a letter to a member of the regulated community that it asserts is consistent with this interpretation. *Id.* at 44 (citing Attachment A). In relation to Respondents' claim that EPA's initial guidance and several regulatory guidance letters are inconsistent with this interpretation, Complainant notes that no exhibit or guidance letters were cited in Respondents' arguments so it is unclear to what Respondents refer. *Id.* at 44-45.

With respect to the fourth factor, respondent inquiries as to the meaning of the regulation

at issue, Complainant argues that these Respondents asked regulators directly and indirectly about the status of the material in question and were told that it was RCRA-regulated, such that they had actual (as well as fair) notice of the meaning of the regulation. *Id.* at 45 (referring back to Complainant’s arguments with respect to the individual liability of Respondents Lofquist and Forster).³⁰

E. Economic Benefit, Beyond BEN, and Multiday Penalties

In their Motion for Accelerated Decision, Respondents attack two parts of Complainant’s proposed penalty: the capture of the profits CIS received from certain sales to WCI Steel (the “profit disgorgement” argument) and the calculation of multi-day penalties for 180 days (the “multi-day penalties” argument). Rs’ MAD at 71-82; Rs’ Reply at 23-28. Respondents raise the profit disgorgement argument because they believe this component of the penalty is improper as a matter of law and seek to have it stricken from the penalty demand. Rs’ Reply at 27. Respondents’ attack on the multi-day penalties issue is, according to Respondents, conditioned on the undersigned’s initial determination that only one shipment of hazardous waste occurred (i.e., the JLM material shipment). *Id.* at 28. If such a determination is made, Respondents seek to have the multi-day penalty limited to “the duration of time that the K022 material remained at the facility, and no longer.” *Id.* Respondents assert that the material would have been transferred from the Facility “within five or six days.” Rs’ MAD at 79 (citing Dzugan Affidavit ¶ 7; Malecki Affidavit ¶ 6).

1. Beyond BEN and Profit Disgorgement

a. Respondents’ Position

Respondents challenge that portion of the penalty proposed by Complainant which related to the profit Respondents are alleged to have made from the sale of used oil blends containing the Unitene and JLM materials (calculated by Complainant as \$212,637).³¹ Rs’ MAD at 74. By way of background, Respondents argue that the total penalty in a civil enforcement proceeding reflects both the gravity of the violation and the economic benefit to the violator. According to

³⁰ Complainant’s earlier argument includes the following chronology: “Ohio EPA expressed concerns regarding the regulatory status of such hazardous waste in an email dated July 12, 2005. Ohio EPA explicitly determined that such hazardous waste must be treated as such (and was not somehow exempt) under the regulations in emails dated October 2005, December 2005 and February 2005 [sic]. U.S. EPA also explicitly determined that the hazardous waste must be treated as such (and was not somehow exempt) under the regulations in a letter dated December 9, 2005.” C’s Reply at 39 n.17. Complainant does not include a citation to any supporting documentation nor are the emails (or their recipients) identified in any other way.

³¹ Respondents initially refer to a figure of \$386,151, but note that this was recently reduced by Complainant to \$212,637. Rs’ Resp. at 24 n.10.

Respondents, “[t]he recapture of economic benefit is designed to place all firms on a ‘level playing field’ so that no firm can benefit by avoiding or delaying the necessary compliance expenditures.” *Id.* at 72 (citing Calculation of the Economic Benefit of Noncompliance in EPA’s Civil Penalty Enforcement Cases, 64 Fed. Reg. 32948, 32961 (June 18, 1999)).

In this case, Respondents argue that Complainant used its standard economic benefit model (“BEN”) to include in the proposed penalty a figure of \$79,462 representing the value of the costs of compliance that CIS avoided or delayed associated with the alleged RCRA violations (including costs of proper permitting, application fees, waste analysis, etc.). *Id.* at 73 (citing McClure Report at 4). Respondents then assert that “EPA 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 U.S. EPA contends, instead, violated RCRA.” *Id.* Based on this asserted concession, Respondents conclude that Complainant is impermissibly “double-dipping” by demanding that CIS also disgorge the profits received from the sale of materials to WCI Steel in addition to paying the adjusted costs of coming into compliance. *Id.* at 73-74.

Respondents argue that the profits received are not “illegal” profits because the underlying transactions would have been legal once CIS incurred the costs of permitting and other compliance measures. Rs’ Reply at 24. Since the purpose of the BEN analysis, according to Respondents, is to ensure that respondents do not gain an unfair advantage over their environmentally-compliant competitors, the penalty serves its purpose if it assumes that respondents and their competitors incur the same compliance costs. Compliant competitors, then, are able to earn profits through their activities and it should be assumed that these Respondents may do likewise once the costs of compliance have been imposed upon them in the form of a penalty. To impose the costs of compliance and to deny them their profits as well, Respondents conclude, goes well beyond leveling the playing field for compliant competitors. Rs’ MAD at 73-76.

To illustrate their argument, Respondents give the example of a hypothetical competitor, ABC Company, which also bought IFF and JLM material and sold it to WCI Steel’s competitor, XYZ Steel, except that ABC Company has already incurred the costs of compliance and is a RCRA-permitted facility. ABC Company makes the same profit on the sale as Respondents so that the proposed penalty does not need to reflect profit to level the playing field between them. *Id.* at 75-76.

Respondents also argue that EPA does not have the discretion to base its penalty on the higher of the costs of compliance and the profit made from the non-compliant activities. *Id.* at 76 (citing *Agency of Natural Res. v. Deso* (“*Deso*”), 824 D.2d 558, 562 (Vt. 2003) (“[u]sing a wrongful profits analysis significantly overinflates the actual economic benefit to the violator; rather than leveling the playing field, it puts him or her at a marked disadvantage”). However, Respondents concede that in some cases it is appropriate to include in a proposed penalty calculation of wrongful profits, but they deny that the present proceeding is such a case. *Id.* at 76

n.24 (citing *Crescio*, EPA Docket No. 5-CWA-98-004, 2001 EPA ALJ LEXIS 143 (ALJ, May 17, 2001) (in which the penalty payable for illegally filling wetlands included an element representing the profit from farming the wetlands since Mr. Crescio could not have farmed them even if he had been in compliance)).

b. Complainant's Position

As Complainant notes in its Response, EPA has authority under Section 3008 of RCRA to assess a civil penalty and determine its amount considering the seriousness of the violation and any good faith efforts to comply with applicable requirements. 42 U.S.C. § 6928. According to Complainant, EPA's June 2003 RCRA Penalty Policy ("RCRA Policy") aims to ensure that, among other things, "economic incentives for noncompliance with RCRA deter persons from committing RCRA violations." C's Resp. at 56 (citing CX 68 at 17363). Complainant argues that this is consistent with EPA's General Enforcement Policy #GM-21 ("GM-21"), which establishes as a goal of EPA enforcement actions the removal of the economic benefit of noncompliance. *Id.* (citing CX 66 at 3). Complainant asserts that both the RCRA Policy and GM-21 emphasize the importance of capturing financial gain or profit in addition to delayed or avoided compliance costs. *Id.* (citing CX 96 (Identifying and Calculating Economic Benefit That Goes Beyond Avoided And/Or Delayed Costs, May 25, 2003)).

Complainant argues that the proposed penalty in this case aims to recover the profit made by Respondents when they sold their oil blend (containing IFF and JLM materials) to WCI, which burned the material in its blast furnace without itself possessing the requisite RCRA permit. C's Resp. at 59 & 59 n.28. Complainant criticizes Respondents' hypothetical involving ABC Company on the basis that it omits the critical fact that Respondents sold their illegal hazardous waste blend to a facility that was not permitted to receive and burn it" with the result that even if CIS has been a "RCRA-permitted" facility, it would still have profited illegally from the sale to WCI. *Id.* at 60-62. Complainant argues that the *Deso* decision is inapposite to the present case because CIS would not have been in compliance merely by obtaining and maintaining a RCRA permit for storage and treatment operations because it still would have been selling its product to an unpermitted facility. *Id.* at 61 n.29. Complainant then offers its own hypothetical of a package store with a liquor license that sells liquor to minors. Even if the store had a license to sell liquor, Complainant argues, it still violates the law when it sells to minors. *Id.* at 62 n.30.

c. Respondents' Counter-Argument

Respondents reject Complainant's argument for two reasons:

First, CIS was not responsible for WCI's RCRA compliance. U.S. EPA has cited to no regulation that imposes on CIS an obligation to ensure that WCI complied with hazardous waste rules. Indeed, U.S. EPA has not alleged in this case that CIS violated RCRA by selling material to WCI. And WCI is not a party in this

case, so its compliance is not at issue. * * *

Second, and more importantly, WCI could have come into compliance simply by undergoing the appropriate permitting process. Of course, there would have been a cost to WCI to do so [but] such costs would have been borne by WCI, not CIS, and the avoidance of such costs were theoretically an economic benefit to WCI, not CIS.

Rs' Reply at 24-25 (internal citations omitted). Respondents also distinguish Complainant's liquor sale analogy because minors cannot buy liquor under any circumstances, whereas WCI could have obtained a RCRA permit. *Id.*

2. Multi-day Penalties

Respondents' arguments regarding the multi-day component are premised on a finding, in this Order, that the IFF materials were not "wastes" within the definition of RCRA. Because this Order defers such determination until hearing, I need not address Respondents' multi-day penalties argument.

IV. Legal Standard

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to:

render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (EPA ALJ Sept. 11, 2002). Rule 56(c) of the FRCP provides that summary judgment:

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Therefore, federal court decisions interpreting Rule 56 provide guidance

for adjudicating motions for accelerated decision. See *CWM Chemical Service*, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the Tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59. Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. Envtl. Prot. Agency*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). Ultimately, “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson* at 249. Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion may support denial of the motion in order of the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *Anderson* at 255.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. The Supreme Court has found that the non-moving party must present “affirmative evidence” and that it cannot defeat the motion without offering “any significant probative evidence tending to support” its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat’l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

V. Discussion

All ten counts in this case are premised on Respondents’ engagement in the treatment and storage of hazardous waste at the CIS Facility.³² Bound up in that premise is a determination that the IFF and JLM materials (either or both) are “wastes” within the meaning of the RCRA regulations. 40 C.F.R. § 261.2. This is a critical jurisdictional element that must be established before any liability can attach. As set forth above in Section III.B, this inquiry involves a complicated application of the different regulatory provisions, many of which the parties

³² The RCRA regulatory language related to its scope and applicability uses the disjunctive to describe facilities engaged in “treating, storing, *or* disposing of hazardous waste” suggesting that a facility need only engage in one such activity (i.e., storing) in order to fall within RCRA’s purview. 40 C.F.R. § 260.10 (emphasis added). Nevertheless, whether the materials were “treated” is a relevant consideration when evaluating whether the materials were suitable for use “as-is” which is part of determining whether they were co-products or by-products and thus potentially not discarded materials.

dispute.³³ For the reasons set forth below, I find that these disputes raise genuine issues of material fact that must be addressed at hearing.

With respect to the first issue addressed herein - whether Respondents “treated” or “stored” the JLM and IFF materials received at the facility - it is clear that the definition of “treatment” is very broad and includes “any” process “designed to change the physical, chemical, or biological character or composition of any hazardous waste” *Id.* [REDACTED]

[REDACTED]. See CX 2 at EPA 32-34, 47; CX 5 at 6048-69; CX 24 at EPA 13139-53; CX 29 at EPA 16813-17; CX 45; Ans. ¶ 22. Further, Respondents have admitted to engaging in “blending used oil to meet specifications.” Ans. ¶ 17. Nevertheless, these facts alone are insufficient to establish that the IFF and JLM materials were “treated” *per se* given that, in counter-point thereto, Respondents have identified statements in EPA’s own Inspection Report which indicate the absence of processing equipment and provided sworn affidavits from three witnesses disputing Complainant’s assessment of what activities actually occurred at the CIS facility. Rs’ Resp. at 5. In addition, the parties both resort to quibbling over the correct interpretation and application of several EPA guidance letters. Rs’ Resp. at 3-4; C’s Reply at 3. As such, Respondents have raised a genuine dispute on this issue, if barely.

With respect to the second issue - whether the JLM and IFF materials were “wastes” - Complainant’s theory of the case is that they were discarded because they were “recycled” within the meaning of 40 C.F.R. § 261.2(c). In arguing that the materials fall within this definition, Complainant advances two independent bases for asserting jurisdiction: (1) the materials were recycled because they were by-products burned for energy recovery, or (2) the materials were recycled because they were commercial chemical products burned for energy recovery. Whether the materials were burned for energy recovery, then, is a critical issue for both the JLM and IFF materials under either approach.

The dispute between the parties over burning for energy recovery can be distilled into a question of chemistry: are the hydrocarbons that make up the JLM and IFF materials incorporated as ingredients in an industrial process into the metallic iron produced by WCI Steel or are they combusted for heat energy in the blast furnace? Complainant asserts that at least some of the injected materials are burned for heat energy and support that claim with detailed references to the Fruehan Declaration and the Second Fruehan Declaration. Respondents assert that after the materials are injected into the blast furnace that “material values” are recovered and incorporated into the metallic iron product, citing to the Rorick Report and the Sass Report. Resolution of this issue thus depends on an evaluation of competing expert testimony, an inquiry that must be undertaken at hearing where the parties have the opportunity for cross-examination

³³ Even in the case of the JLM materials, where Respondents do not contest as many aspects of the definition as they do for the IFF materials, Respondents do not concede that the JLM materials were “burned for energy recovery” as defined in 40 C.F.R. § 261.2(c) or (e).

and the undersigned can evaluate credibility and demeanor.³⁴

Even a resolution of the “burned for energy recovery” dispute would not necessarily require a conclusion that the IFF materials were “wastes” because Respondents have raised a genuine issue of fact with respect to the characterization and nature of Unitene. Complainant’s reliance on the *Breentag* factors for determining a by-product (the residual character, intentional production, and fitness for use as-is) requires an intensely factual inquiry into the production process at IFF’s facility. C’s MAD at 18. Moreover, in applying *Breentag* to the facts in this case, Complainant relies on the Clark Declaration as well as the deposition transcripts of the current and former IFF employees.³⁵ In response, Respondents rely on the Leightner Affidavit, the Second Sass Report, and the Shepherd Affidavit. Again, this creates an issue of credibility and a need for cross-examination.

A similar need arises under the second, commercial chemical products approach, as this requires an inquiry into both the “normal manner of use” and the “intended use” of the would-be

³⁴ Respondents point to language in the preamble to the Waste Fuel Rule that they argue creates ambiguity in understanding when the burning of used oil or hazardous wastes is regulated. Rs’ MAD at 48 (citing 50 Fed. Reg. at 49167). That same preamble, however, sets forth the following organizing principles:

“[S]ince boilers, by definition, have as their primary purpose the recovery of energy, if materials are also recovered, this recovery is ancillary to the purpose of the unit, and so does not alter the regulatory status of the activity. We also explained that the regulations apply when an industrial furnace burns the same material for both energy and material recovery (e.g., when blast furnaces burn organic wastes to recover both energy and carbon values). Today’s regulations, however, do not apply to hazardous wastes burned in industrial furnaces solely for material recovery.”

50 Fed. Reg. at 49167 (internal citations omitted). This language suggests that EPA’s assertion of jurisdiction depends on the “purpose of the unit.” In addition, the Respondents challenge the blast furnace example (now 27 years old) as being based on “outdated science and manufacturing technology.” Respondents have at least raised a cognizable challenge to the presumption that materials injected into blast furnaces fall within EPA’s jurisdiction *per se*. This issue must be fully developed at hearing.

³⁵ [REDACTED]

[REDACTED]

Moreover, it is not clear that the available evidence would support the conclusion that Unitene LE and AGR are “ordinarily used as commodities in trade by the general public” as the preamble language to which Respondents point suggests. Final Rule, 50 Fed. Reg. at 625.

product. This second approach is complicated by the alternative argument Respondents' advance: that Unitene is, itself, a fuel such that burning it in the blast furnace is consistent with its normal use, thereby removing it from the definition of "waste." See RX 90 (EPA guidance letter stating the Agency's position that a commercial chemical product normally used as a fuel is not a waste if burned for energy recovery). Pursuing these divergent arguments (and their respective counter-arguments) puts Respondents in the position of arguing that Unitene is not burned for energy recovery but that it can also be concluded, as a matter of law, that Unitene is a fuel the normal use of which includes burning for energy recovery. This awkward alternative argument also puts Complainant in the position of arguing that Unitene is, by its very nature, used in a blast furnace in order to recover energy but it is also unlike any other type of recognized "fuel" and therefore burning it is not a normal use. Determining the "normal use" of Unitene is, in turn, an integral part of establishing whether it is a by-product or a co-product.

With respect to the third issue of the individual liability of Respondents Lofquist and Forster as "operators" of the CIS facility, it is helpful that the parties appear to agree that application of the *Southern Timber II* factors is the appropriate framework within which to decide this issue. In addition, Complainant provides very specific facts to support its argument and cites liberally to its proposed exhibits. C's MAD at 66-71. Respondents, however, raise an important issue: in determining whether an individual is an operator, it is necessary to establish the entire universe of "operational" duties and activities in order to know whether the fraction attributed to a particular corporate officer is large enough to be considered "pervasive" control of the "overall" operations. Complainant's cited evidence points to many separate instances where one or both individual Respondents exercised control over CIS' operations.³⁶ Nevertheless, it is difficult to establish that both are "operators" as a matter of law based on the evidence put forth by the parties at this time. While Respondents' reference to undisputed facts is minimal, they do establish the presence of a plant manager (in addition to the relative infrequency of Lofquist and Forster's physical presence at the facility) and they do raise the point that Complainant's citation to "day tank" analyses is limited to a small percentage of the total such analyses performed for CIS. Rs' Reply at 20. Moreover, Respondents support their contention with the Lofquist Affidavit, the Forster Affidavit, and the Second Forster Affidavit. Given the conflicting statements in the record before me, I find that there are genuine issues of material fact as to the individual liability of Respondents Lofquist and Forster than must be resolved at hearing.

With regard to the fourth issue, in their Amended Answer, Respondents raise a different (and new) fair notice defense based on different facts than the initial fair notice defense stricken from the Answer by prior Order. This version of the fair notice defense attacks the clarity of the

³⁶ I note, however, that Complainant's assertion that Respondents Lofquist and Forster acted as representatives in transactions with other companies, a major factor in determining active control, is based in part on testimony by non-party individuals that Complainant asserts "is likely" to support its position. C's Resp. at 48. Whether such testimony ultimately will support Complainant's position can only be determined at hearing and cannot form the basis of an accelerated decision.

“recycling rule” and is related solely to the receipt of the JLM materials in November 2005. Rs’ Resp. at 43. As an affirmative defense, the burdens of presentation and persuasion rest on Respondents. 40 C.F.R. § 22.24(a). The parties generally agree on the standard for evaluating such a defense (as set forth in *General Electric*) and, as Complainant notes, the EAB has identified, in the *Howmet* case, the four principal factors that must be applied (the text of the regulations, the regulations as a whole, the regulatory history or agency interpretive guidance, and any respondent inquiries as to the meaning of the regulation at issue).

Unlike the initial fair notice defense, the defense Respondents now assert is at least a cognizable attack on the clarity of the relevant regulations. According to Respondents, the “recycling rule” clearly contemplates that the *purpose* of injecting the materials into the blast furnace is what determines whether the materials are treated as waste. Rs’ Resp. at 46. This argument seems to be premised on the notion that an actor’s intent governs whether the material is regulated. By contrast, Complainant argues that the mere fact that both energy and carbon values are recovered by burning brings the material within the definition of waste, regardless of the intent behind the burning. C’s Reply at 44 (quoting Final Rule at 630-31). While the language Complainant quotes specifically identifies a blast furnace as an example of a regulated furnace, it does so using the following language: “[e]xamples are blast furnace that burn organic wastes to recover both energy and carbon values” *Id.* This language at least suggests that burning “to recover” is an intentional act and the actor purposefully burns the material *in order* to recover energy. Although Complainant’s references to the regulatory history and EPA guidance are thorough, and Complainant’s argument may even prevail on this issue, it is not sufficient to bar Respondents’ defense as a matter of law.

Moreover, the parties dispute the facts and chronology related to Respondents’ inquiries as to the meaning of the regulation. If, as Respondents allege, the Louisiana DEP and Ohio EPA provided conflicting statements as the applicability of the regulations to the actions the Respondents were contemplating, this would certainly support an argument that there was “significant disagreement” among the various regulatory agencies. *General Electric*, 53 F.3d at 1330. While the available evidence does not uniformly support Respondents’ position (*see e.g.*, CX 2 at EPA 2882-83), the defense survives Complainant’s implicit motion to strike it. Respondents are reminded that they will bear the burden of proof at hearing to establish this affirmative defense.

Finally, as to the issue of the economic benefit component of the proposed penalty, I find that this issue must be further explored at hearing. Complainant’s position, that EPA may theoretically recover illegal profits as part of an administrative enforcement action, cannot be seriously doubted. *See, e.g., Crescio*, 2001 EPA ALJ LEXIS 143. However, the interplay between “costs of compliance” and “illegal profits” is not as clear as Complainant asserts. The arguments of both parties present logical difficulties.

Respondents make several assumptions implicit in their hypothetical illustration involving ABC Company and XYZ Steel. One, which is logically sound, is that neither WCI nor

XYZ Steel pays a premium for the IFF and JLM materials *because* they were (under the “compliant facility” condition) hazardous waste. Thus, Respondents conclude that, all else equal, the price obtained by ABC Company and CIS was the same. However, all else is not equal and therein lies the logical inconsistency. Respondents argue that but-for the cost of coming into compliance, sales of hazardous waste made to WCI would have been legal and the same profits would have inured to CIS. Rs’ MAD at 75. This ignores the *process* of coming into compliance and, more importantly, assumes that the market is static - i.e., that the business deal with WCI would have occurred under the same conditions and for the same price at the conclusion of a potentially long permitting process as it would have at the time the transactions actually occurred. This assumption ignores the reality that being able to sell *now* often makes the difference between closing a deal and losing a deal. It is possible that CIS was in a better position to meet WCI’s business needs immediately than a similarly situated (unpermitted) competitor that would have had to suffer the delay and cost of permitting in order to enter into a legal sale of hazardous waste. In order to save the hypothetical from this counterfactual conundrum, Respondents would have to show that no amount of delay (or permit-required modifications) would have materially affected the conditions of the eventual transaction, such that the price received in reality would not differ from the price received in the parallel “compliant facility” universe.

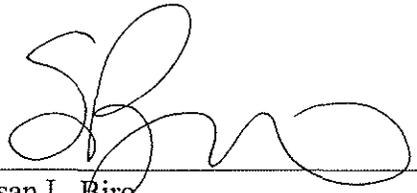
Complainant’s argument also suffers from an important deficiency. Complainant attacks Respondents’ hypothetical based on the perceived logical discrepancy that even if CIS had been a properly permitted facility, the sale to WCI would *still* have been unlawful because WCI was not a properly permitted facility itself and could not legally burn the materials it bought from (now-compliant) CIS. As Respondents note, Complainant has not cited any regulation that imposes on CIS an obligation to ensure WCI’s compliance and, more importantly, the Complaint does not allege that CIS violated RCRA by selling material to WCI (or any other unpermitted facility). Respondents argue that they cannot be penalized for activities that do not appear in the Complaint. Rs’ Reply at 24-25. While it does not appear that liability for any of the counts alleged rests upon proof of WCI’s illegal burning of the materials, Respondents arguments do raise some question as to the propriety of assessing a penalty based in substantial part on the notion that the transaction was illegal even if all the allegations in the Complaint are untrue. In any event, this issue cannot be decided as a matter of law as Respondents request and must be addressed further at hearing and in subsequent briefings.

VI. Conclusion

The parties in this case have filed numerous proposed exhibits and made substantial arguments in support of their respective positions. The parties also engaged in the good practice of including sworn affidavits and declarations along with their briefings on the instant Motions. While Complainant presents a well-organized and valid argument to support its *prima facie* case, Respondents counter with specific disputes related to several critical facts and support those arguments with a plethora of affidavits and expert reports. The competing testimony of multiple

fact and expert witnesses, by itself, is a reason to go to hearing. In addition, however, both parties advance arguments based on intricacies in the RCRA regulations that are far from clear cut. In many instances the parties must resort to non-binding language in guidance documents, EPA opinion letters, and preamble language in order to make their case. This also militates against the propriety of deciding these issues as a matter of law. While the parties are commended for their extensive briefings and obvious effort to narrow the scope of this case, neither has persuasively established that there are no genuine issues of material fact. Accordingly, Complainant's and Respondents' respective Motions for Accelerated Decision are **DENIED**.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'Susan L. Biro', written over a horizontal line.

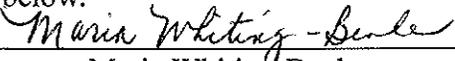
Susan L. Biro
Chief Administrative Law Judge

Dated: May 31, 2012 (Redacted version)
Washington, D.C.

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 Motions For Accelerated Decision Redacted - Original Contains Confidential Business Information**, dated May 31, 2012, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: May 31, 2012

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