BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re:	)	
	)	
Carbon Injection Systems LLC,	)	
Scott Forster,	)	**RCRA Appeal No. 15-01**
and Eric Lofquist,	)	
	)	
Docket No. RCRA-05-2011-0009	)	
	)	

POST-ARGUMENT BRIEF OF APPELLANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

CATHERINE GARYPIE
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604
PH: (312) 886-5825
FAX: (312) 692-2513
Email: garypie.catherine@epa.gov

JEFFREY A. CAHN
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604
PH: (312) 886-6670
FAX: (312) 692-2971
Email: cahn.jeff@epa.gov

Of Counsel: MARY S. ANDREWS
Office of General Counsel
U.S. Environmental Protection Agency

PETER J. RAACK
Office of Civil Enforcement
U.S. Environmental Protection Agency

TABLE OF CONTENTS

Appellant United States Environmental Protection Agency (Appellant EPA) submits this Brief pursuant to the Environmental Appeals Board's October 2, 2015, Order on Post-Argument Briefing, and in accordance with EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22.

Appellant EPA submitted a detailed outline of the procedural posture and central issues in this matter in its August 18, 2015, Opening Brief. This Brief provides additional information on the questions posed at the oral argument held in this matter on October 1, 2015.

I. Response to the Board's Questions Regarding the Appropriate Measure of the Heat Impact of Hydrocarbon Injectants on the Blast Furnace

At the oral argument, the Board asked a number of questions directed at the appropriate measure to use to determine the heat impact of secondary material hydrocarbon injectants on the blast furnace raceway. The measure relates to whether hydrocarbon injectants were "burned for energy recovery" and were, thus, "solid waste." Specifically, the Board asked whether the record evidence and the Cadence discussion supported the conclusion that hydrocarbon injectants provided sensible heat in the raceway, rather than utilizing a "net impact" measure of heat from the injectants. Oral Argument Transcript (Oral Arg. Tr.) (Oct. 1, 2015) at 12-13, 29, 40. The Board asked the parties to analyze the question using a "heat energy in" minus "heat energy out" equals "net energy that remains" formula, focusing primarily on the "heat energy in" component. Oral Arg. Tr. at 13. Finally, the Board asked whether Appellant EPA is continuing to rely on a "net energy" analysis and, therefore, not on a "substantial, useful heat" standard, and why Appellant EPA believes a "net energy" analysis is called for by the Cadence discussion. Oral Arg. Tr. at 13, 46.

In this case, Appellant EPA has focused on the "net impact" of hydrocarbon injectants on the blast furnace raceway. We did this because in the Cadence discussion the Agency used the terms "useful," "substantial," and "sensible" in describing the heat provided by the injectants, while also noting that the injectants cool flame temperatures in the combustion zone and expressly noting that the net reactions of injected fuels in the combustion zone are endothermic. 50 Fed. Reg. 49, 172-49, 173. The terms "substantial," "useful," and "sensible" suggest consideration of the overall impact of the injectant on the combustion zone (also called the raceway). If the contribution is *de minimis* or irrelevant, then the contribution might not be considered substantial, useful or sensible. As noted in the Cadence discussion and as the experts testified, hydrocarbon injectants cool flame temperatures in the raceway.[1] Tr. V at 1176-77 (Fruehan); Tr. XI at 2534, 2547-48 (Poveromo). Further, the Cadence discussion does not contain an express statement that hydrocarbon injectants provide substantial, useful heat energy to the combustion zone. A "net impact" reading does not undermine the Cadence conclusion that hydrocarbon injectants provide substantial, useful heat to the blast furnace, because the Cadence discussion expressly states that the top gases resulting from the oxidation of hydrocarbon injectants in the raceway provide substantial and useful heat energy when those top gases are subsequently burned in the stoves used to create the hot blast. 50 Fed. Reg. 49,164, 49,172.

[1] The hot blast comes into the blast furnace at a temperature of roughly 2,000 degrees Fahrenheit. 50 Fed. Reg. 49,164, 49,172; Tr. V at 1140 (Fruehan); Tr. X at 2378 (Rorick) Tr. XI at 2542 (Poveromo). The temperature in the raceway is approximately 4,000 degrees Fahrenheit. 50 Fed. Reg. 49,164, 49,172; Tr. V at 1091 (Fruehan). The hot blast and hydrocarbon injectants enter the blast furnace through the tuyeres. The tuyeres are water cooled to prevent them from melting at raceway temperatures. CX86 at 18467. The injectants help cool flame temperature. At a temperature of 4,000 degrees Fahrenheit, the reduction in flame temperature caused by hydrocarbon injectants can be expected to be negligible.

Regarding the "heat in" aspect of the Board's questions, it is possible to read the Cadence discussion as concluding that the oxidation of hydrocarbon injectants in the combustion zone provides substantial, useful heat in the combustion zone. This reading is consistent with the expert testimony. As noted in the Cadence discussion, the Agency determined that Cadence Product 312 was a fuel injectant because "it has a heating value by specification of 10,500 to 14,000 Btu/lb, which is comparable to the heating value of coke and coal." 50 Fed. Reg. 49,164, 49,173. The Agency also stated that:

> fuel injectants first behave as *bona fide* fuels by combusting to (ideally) carbon dioxide and water. The amount of sensible heat released during this combustion phase is measured by a fuel injectant's heating value in Btu/lb. Immediately after the fuel is combusted, the combustion products act as ingredients to furnace reactions by being converted to the reducing gases carbon monoxide and hydrogen during endothermic reactions. The fact that fuel injectants release substantial heat energy while providing hydrocarbons for reactions enables operators to reduce coke rates.

50 Fed. Reg. 49,164, 49,172. Finally, the Agency stated in the Cadence discussion that "[i]njected liquid fuels first undergo endothermic vaporization, then exothermic combustion to (ideally) carbon dioxide and water where sensible heat is released, and finally, endothermic disassociation and reduction in the presence of excess carbon provided by the coke to form the reducing gases carbon monoxide and hydrogen." 50 Fed. Reg. 49,164, 49,172. Although the net impact of the hydrocarbon injectant on flame temperature is to lower that temperature, during the exothermic reaction substantial useful heat energy is released in the combustion zone. Tr. V at 1179-1181 (Fruehan); Tr. X at 2489-2490 (Rorick). The carbon molecules from hydrocarbon injectants and the carbon molecules from coke will oxidize at the same temperature. And flame temperature is controlled by adjusting other blast furnace inputs (such as hot blast temperature or moisture content) as Professor Fruehan and Dr. Poveromo explained. Tr. V at 1158-1159, 1177-1178 (Fruehan); Tr. XI at 2534-2535, 2547-2548 (Poveromo). The sensible heat from the

exothermic portion of the reaction (which results from the oxidation of the carbon from the injectant) helps to heat up the reducing gases in the raceway and the materials higher up in the blast furnace. Tr. V at 1097, 1141-1142, 1181 (Freuhan); Tr. XI at 2577 (Poveromo). Accordingly, the carbon from hydrocarbon injectants can be viewed as providing heat energy in the "energy in" part of the Board's equation.

II. The Regulatory Phrase "Burned For Energy Recovery" Can Fairly be Read to Include the Concept of Chemical Energy Even if EPA's Previous Focus has Primarily Been on Heat Energy

At several points in the oral argument, the Board inquired where in the preambles cited by Appellant EPA the Agency had clearly stated that chemical energy recovery was included in the phrase "burning for energy recovery" as found in 40 C.F.R. § 261.2. Oral Arg. Tr. at 18, 23, 24. In the Agency discussions of this phrase that have been referenced in the briefs and at oral argument, the Agency did not include a statement that explicitly set forth all scenarios, including the different types of energy, that may fall under "energy recovery." Rather, preamble discussions have generally focused on heat energy, admittedly the type of energy that regulated entities most commonly seek to recover when burning secondary materials. In the Cadence discussion, however, the Agency expressly considered the chemical energy produced by the oxidation of injectants in the raceway as indicated by the clear statement that *carbon monoxide reduces the iron ore by* net *energy absorbing reactions* to produce iron.[2] 50 Fed. Reg. 49,164, 49,172. In other words, the chemical energy contained in the carbon monoxide and hydrogen produced from the hydrocarbon injectants is at least partially "used up" in energy absorbing chemical reactions as it reduces iron oxide to iron, whether the carbon monoxide is derived from

[2] "The carbon monoxide reduces the iron ore by [net] energy absorbing reactions to produce pig iron." 50 Fed. Reg. 49,164, 49,172.

coke or from the hydrocarbon injectants. This preamble statement describes "burning for energy recovery" as including not just the sensible heat energy provided by the oxidized injectant but also the chemical energy provided by carbon monoxide. For the reasons set forth in the briefs and at oral argument, we believe that the language cannot and should not be read to be as limited as the Presiding Officer read it; that the Cadence discussion, read as a whole, incorporates the concept of chemical energy recovery; and that the Agency has not explicitly stated that the phrase includes only heat energy to the exclusion of any other type of energy recovery.

III. Combustion/Burning is Taking Place in the Raceway

At oral argument, counsel for Respondent repeatedly insisted that carbon injectants are not combusted in the blast furnace raceway. Oral Arg. Tr. at 70-71, 80-82, 130-31. Counsel's goal was apparently, in part, to impress on the Board that because there is no combustion, there is no release of heat despite the high Btu content of the injectants. Oral Arg. Tr. at 80-83. At other times, the point seemed to be to discredit the Agency's understanding of blast furnace operations, as Respondents first argue in their Initial Post-Hearing Brief, at page 27, and reiterated in Respondents' Opening Brief at 21-22 (stating that the iron making industry has moved beyond "combustion theories"). Tr. X at 2438 (Rorick). And at times Respondents insist that what happens in the blast furnace is dissociation and reduction, a chemical reaction distinct from oxidation or burning. Oral Arg. Tr. at 70.

Yet Respondents' expert testimony and Respondents' briefs acknowledge that combustion (burning) is taking place in the raceway. For example, in their opening brief before the Board, Respondents state that in a blast furnace, burning happens in the raceway and reduction happens above the raceway. Respondents' Opening Brief at 11-12. *See also, e.g.,* Tr. X at 2485, 2493 (Rorick). And although Dr. Poveromo emphasizes the distinction between the

instantaneous dissociation of injectants in the raceway and "standard combustion," Tr. XI at 2542, 2545, he does this to support his conclusion that injectants provide no net heat to the process. Tr. XI at 2555. But he also concedes that the reaction of injectants with oxygen can be called combustion or burning. *Id.*

IV. EPA Could Have Argued That the Injectants From JLM and IFF Were "Burned" Under OAC § 3745-51-02(B)(2) and Respondents Cannot Prove an Affirmative Defense Under OAC § 3745-51-02(E)(1)(a)

The Board asked whether Appellant EPA could have argued in the alternative that the injectants were solid wastes because they were "discarded" as "abandoned" because they were "burned." Indeed, it is possible that Appellant EPA could have made that argument. The Board also asked, assuming that burden was met, whether there is sufficient evidence in the record for Respondents to meet their burden to show the affirmative defense described in OAC § 3745-51-02 (E)(1)(a) [40 C.F.R. §261.2(e)(1)(i)] (as directed by OAC § 3745-51-02 (f) [40 C.F.R. § 261.2(f)]), where that section provides that Respondents must prove there is a "known market" for the material. Oral Arg. Tr. at 48-55 and 124-129. Respondents do not have sufficient evidence to prove this defense.

The record shows that the JLM and IFF materials were not "used or reused as ingredients in an industrial process to make a product" – in particular, Respondents did not demonstrate that there was a known market or disposition for the materials. Most relevant is how the materials were handled prior and subsequent to the time during which the materials were sold to Respondents. *See* Appellant EPA Post Hearing Initial Brief at 22-25 (Unitene LE) and 33-37 (Unitene AGR); Appellant EPA Post-Hearing Reply Brief at 36-47.

V. Fair Notice of the Agency's Position is Provided Regardless of Whether the Underlying Rationale for the Agency Position Changes

The Board inquired whether, if the underlying rationale for an Agency regulatory determination changes, fair notice of the Agency's position still was provided. Oral Arg. Tr. at 37-38. The answer is yes. In fair notice cases the inquiry is focused on the Agency's regulatory conclusion as to whether the entity or the material is subject to the regulations and, if regulated, whether the regulations that are expected to be complied with are ascertainable. The underlying rationale may be of interest to the inquiring entity to provide an explanation for how the Agency arrived at its conclusion but it is not a necessary part of the Agency's ultimate conclusion. As the Supreme Court has stated "a fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 S.Ct. 2307, 2317 (2012). A review of the Court's decision and discussion of the fair notice doctrine indicates that the emphasis is on whether adequate notice has been given that the entity is regulated and the behavior that is prohibited or required, not on the government's rationale underlying the regulatory determination. "[All persons] are entitled to be informed as to what the State commands or forbids." *Id.* (quoting *Papachristou* v. *Jacksonville*, 405 U.S. 156, 162 (1972)). "[Due process] requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'" *Id.* (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). "[R]egulated parties should know what is required of them so they may act accordingly." *Id.*

The Court of Appeals for the DC Circuit has also focused on the ultimate regulatory determination in looking at fair notice claims rather than on how the Agency arrived at that determination. In *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), the court stated

that if a party is "able to identify, with 'ascertainable certainty' the standards with which the agency expects parties to conform, then the agency has fairly noticed a petitioner of the agency's interpretation" (emphasis added). The court even offered a hypothetical scenario: "If, for example, an agency informs a regulated party that it must seek a permit for a particular process, but the party begins processing without seeking a permit, the agency's pre-violation contact with the regulated party has provided notice." *Gen. Elec.,* 53 F.3d at 1329. In both of these references, it is clear the court was not focused on whether the agency provided adequate rationale for its decision, only that it provide clear notice of its position and the requirements with which the party must comply.

If providing the regulatory conclusion is all that is required, any additional statements or information provided by the Agency are not necessary for fair notice. Therefore, if the Agency provides more information on how it arrived at a particular conclusion and later determines that there is an alternative basis for that same conclusion, such a change in underlying rationale cannot undo fair notice, as the rationale was not required for notice to be fair in the first place. If the Agency informed an entity that its activities required a RCRA hazardous waste permit and that determination was based on a belief that permit-triggering waste storage activity was occurring and it later turned out that the facility was engaged in waste treatment activity rather than storage, which triggered the need to obtain the exact same permit, the entity could not validly claim that it lacked fair notice of the Agency's determination that a permit was required. In this case, if the 2005 letter from Division Director Guerriero (CX 47) had simply said that the Region, after considering the information provided by the requestor, has determined that the material is a RCRA solid waste and that the transport and treatment of it must comply with the authorized Ohio regulations, would it have been deficient in any respect for not providing notice

as to the Agency's rationale? No, because it would have clearly stated the Region's conclusion. Thus, the letter that provides the Region's position and additional information about the rationale cannot be lacking in fair notice simply because it offers more than what is necessary to put a party on notice, even if the additional information provided is later determined to be outdated or not consistent with current thinking.

VI. Where a Party Has Not Received Adequate Notice of What a Regulation Requires, EPA May Not Penalize That Party for Violating That Regulation

The Board expressed concern about Appellant EPA's failure to substantively respond to the third question in the Board's Order Identifying Issues to be Briefed. Oral Arg. Tr. at 36-37. For the record, Appellant EPA notes that the Board has been clear in previous decisions that where a party has not received adequate notice of what a regulation requires, it is contrary to the constitutional principle of due process for the Agency to penalize that party for violating that regulation. *See, e.g., In re Howmet Corporation,* 13 E.A.D. 272, 303-309 (EAB 2007), *aff'd, Howmet Corp. v. EPA*, 656 F. Supp.2d 167 (D.D.C. 2009), *aff'd, Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010). Appellant EPA is not challenging this position and would agree that if the Board determines that Respondents did not receive fair notice of the Agency's determination that the materials in question here were RCRA-regulated solid waste, either from the regulations themselves, prior Agency statements, or the pre-violation communication, it would not be appropriate for the Agency to seek penalties in this case.[3]

---

[3] The Board has adopted the criteria articulated in *General Electric. See, e.g. In re Environmental Protection Services, Inc.*13 E.A.D. 506, 549 (EAB 2008); *In re V-1 Oil Co.*, 8 E.A.D. 729, 751 (EAB 2000) (quoting *General Electr Co. v. EPA,* 53 F.3d 1324, 1329 (D.C. Cir. 1995). Additionally, the Board has articulated that "[b]efore a party may be deprived of property, for example, by having a penalty imposed on it, it must receive fair notice of the conduct required or prohibited by the Agency." *In re Advanced Electronics, Inc.*, 10 E.A.D. 385, 403 (EAB 2002).

VII. Respondents Had Methods to Raise Their Objection to EPA's Determination That the Material was Regulated Other Than Violating the Law

During the argument, counsel for Respondents claimed that other than challenging the Agency's long-standing regulatory determination in the context of this enforcement action, the Respondents had virtually no other venue to raise their disagreement with that determination. Oral Arg. Tr. at 121.

First, the fact that there was a discussion of how, when, and where the Agency's determination could have been challenged indicates there is no real basis for Respondents' fair notice claim and counsel for Respondents could not have been clearer on that at oral argument:

> MS. EIBER: If the Agency intended to regulate this material, the point -- the only point that I was trying to make to the Board is that my clients acquiesced in this. They acquiesced in this back in 2005.
> . . .
> They understood what the Agency wanted to do. They got it. But they always thought that the Agency was wrong. Okay?
> . . .
> We acquiesced in what the Agency wanted us to do, but the Agency was wrong. They did not have the jurisdiction to regulate this material in the blast furnace.
> . . .
> And so, at the end of the day, it's not just about one shipment, it's not about that at all.

Oral Arg. Tr. at 62-63.

> When my clients first went into business [in 2005], they approached the Agency and did challenge the Agency's understanding of this.
> And when the Agency said, no, we're sticking by our earlier understanding of what goes on in a blast furnace, my clients basically said okay. And, you know, that was in 2005. It's a decade alter [sic, probably should be "later"] and here we are still fighting about it, but not Because [sic] we didn't say okay. Okay?

Oral Arg. Tr. at 120-121. This entity heard loud and clear what the Agency interpretation was regarding the regulatory status of their material, decided the Agency was wrong, and decided further to operate at odds with that regulatory determination. Unlike the situation in *Howmet*, the

Respondents (or their representatives) did inquire about their material's regulatory status. They just didn't like the answer they received. Thus, Respondents might be able to argue about whether the regulations appropriately apply to them but they cannot argue they did not know its determination.[4]

As for the ability to challenge that determination, we disagree that Respondents were forced to wait until an enforcement action was brought to raise their disagreement with the Agency's conclusion regarding their materials. First, Respondents (or their representatives) could have followed up with the Agency after receiving the December 2005 letter from Division Director Guerriero (CX47) to inform the Region that they disagreed either with the regulatory conclusion or the rationale provided for that conclusion. In the face of a clear regulatory determination an entity disagrees with, it is not unreasonable to think that the entity would follow up to indicate the basis for the disagreement and determine whether there were factual or legal errors underlying the determination that could be corrected. There is nothing in the record suggesting any follow-up contact between Respondents and the region (or headquarters) regarding their disagreement with the Agency's regulatory determination.

Second, RCRA Section 7004 and the regulations allow any person at any time to petition the Administrator to modify, amend or revoke any RCRA hazardous waste regulation. 40 C.F.R. §260.20, 42 U.S.C. § 6974. The Respondents made an initial inquiry to the Agency as to the whether the regulations applied to them. Upon hearing that the material was regulated, they chose to ignore that response. But Respondents clearly could have availed themselves of the opportunity afforded to them in the regulations and the statute to seek amendment (or repeal) of

[4] Note that Respondents received the same response to the same regulatory inquiry made to the State of Ohio. CX13 at EPA10149-10157.

the regulations under the belief that the regulations should not cover what the Agency told them the regulations covered (namely, the secondary materials they were handling). This venue would have provided them an appropriate way to alert the Agency that, based on what they heard from the Division Director, there was a regulation that either exceeded the scope of Agency's jurisdiction or that there was a universe of regulated material that should not be regulated. Suffice it to say, the record in this case includes no reference to any effort on Respondents' part to request such a change.[5]

VIII. Additional Case Law Supports the Board Taking Official Notice of the Gas Utilization Study

During the October 1 oral argument, the Board noted that the Blast Furnace Gas Utilization Study referenced in EPA's Opening Brief and attached to its Response Brief "doesn't seem to fit in that box" of documents that the Board took official notice of in the *Howmet* decision. Oral Arg. Tr. at 47. The Board then inquired whether counsel for EPA could provide other case law to support the Board's taking official notice of the Study in question here. In *Howmet*, the Board took official notice of several documents, including a fertilizer report and a letter to an outside party. *Howmet*, 13 E.A.D. at 288 at n. 32 and 300 at n. 54. Even more significantly, in *Howmet*, the Board took official notice of a recycling guidance manual cited by EPA in a Federal Register notice – similar to the Study in question in this matter. *Howmet*, 13 E.A.D. at 288 at n. 32, 299 at n. 52.

Although the Board did not specify exactly why it believed this Study is different from the documents noticed in *Howmet*, one difference might be that the documents in *Howmet* were cited for regulatory interpretations and conclusions they contained whereas the study here is

[5] This is separate from the delisting procedure referenced by Respondents' counsel. Oral Arg. Tr. at 121.

offered to demonstrate that it was a fact in the public domain that the WCI furnace, at least as of 1986, used a substantial portion of the top gases to produce heat in the related stoves.[6] Additionally, this Study was submitted to the Agency during a rulemaking process, relied upon by the Agency, quoted in the Federal Register rulemaking notice and then included in the docket of those documents that formed the basis for the Agency's rulemaking decisions, all of which lends substantial credibility to the information contained therein.[7]

The Board has repeatedly affirmed that it may take official notice of documents in the public domain, *see, e.g., In re Stevenson et al.*, CWA Appeal No. 13-01, slip op. at 4, n. 1 (EAB Oct. 24, 2013); *In re Cutler,* 11 E.A.D 622, 651 (EAB 2004); and that the Board generally takes official notice of relevant non-record information contained in statutes, regulations, judicial proceedings, public records, and Agency records, including EPA guidance documents and memoranda. *In re Russell City Energy,* PSD Appeal Nos. 10-01 through 10-05, slip op. at 108, n. 99 (EAB Nov. 18, 2010). Appellant EPA is unaware of any previous Board cases where the Board has set forth a standard that would permit, on one hand, official notice of documents like those noticed in *Howmet* while, on the other hand, denying notice to the type in question here. Where the Board has declined official notice, it has not been based on a discernable standard that is germane here. *Russell City* at 47-48 and 128 at n. 118 (e-mail did not fall into the general category of public documents such as "statutes, regulations, judicial proceedings, public records, and Agency documents" the Board will officially notice; petitions filed in other cases were not

---

[6] This is not an obscure, irrelevant document discovered in the dark recesses of the Agency federal records archive center. To the contrary, this document was relied upon and cited to in a Federal Register notice on the same page that the parties have cited to in their briefs before the Board (52 Fed. Reg. 16,981, 16,987).

[7] Given the penalties associated with providing false information to the government, information provided to EPA during the rulemaking process contains a certain level of inherent credibility.

noticed because party failed to provide relevance rationale). In fact, the Board has, significant to this question, officially noticed documents cited for their factual content in previous decisions. In *Stevenson*, the Board took notice of a state document regarding river flow, direction, and distance. *Stevenson,* slip op. at 4, n. 1. The Board has also officially noticed city population densities based on census information as facts that supported Agency decisions. *In re Footprint Power*, PSD Appeal No. 14-02 slip op. at 39, n. 38 (EAB Nov. 18, 2010). And the Board has taken official notice of factual content when those facts are what is, at least in part, in dispute. In *City of Denison*, the Board took official notice of an order establishing the line of authority in a regional office where that authority was specifically challenged by the respondent. *In re City of Denison*, 4 E.A.D. 414, 419 at n. 8 (1992). The study in question here, having been cited to and relied upon in a formal Agency rulemaking document, is clearly a public record and thus within the general category of documents the Board can officially notice.[8]

IX. The Relationship Between Appellant EPA's Chemical Energy Argument and the Top Gas Argument

The Board inquired as to the relationship between Appellant EPA's argument regarding the scope of the term "energy recovery" and the argument regarding the use of the top gas to recover substantial heat value via the stoves. Oral Arg. Tr. at 22-23. These are arguments offered in the alternative. First, we think that the term "burning for energy recovery" is broad enough to include chemical energy recovery. Second, if the Board believes that "burning for energy recovery" is limited to only heat energy, then we believe the heat obtained from the top gases via the stoves is adequate to establish the requisite heat energy recovery.

[8] "Public records" are generally defined as those that a governmental unit is required to keep and are subject to public inspection (*see, e.g.*, Black's Law Dictionary, p. 1107 (5th ed. 1979)), both of which are true regarding the study cited here.

Respectfully Submitted,

Counsel for EPA:

10/16/15
Date

Catherine Garypie, Associate Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604
PH (312) 886-5825
Email: garypie.catherine@epa.gov

Jeffrey A. Cahn, Associate Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604
PH (312) 886-6670
Email: cahn.jeff@epa.gov