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January 28, 2013

BY HAND DELIVERY

US EPA Region 5
Office of the Regional Hearing Clerk
Attention: La Dawn Whitehead
77 W. Jackson Blvd.
Mailcode: E-19J
Chicago, IL 60604-3590

RE: *In re Carbon Injection Systems, et al.*, RCRA 05-2011-0009

Dear Ms. Whitehead:

Attached for filing is an original and copy of Respondents' Joint Post-Hearing Sur-Reply Brief with CBI REDACTED for filing in the public record. The original of this document was filed under seal (containing CBI) on January 25, 2013.

Thank you for your assistance.

Very truly yours,

Lawrence W. Falbe

LWF:me

Enclosures

cc: Ms. Jennifer Wolff, Office of the Chief Administrative Law Judge
Catherine Garypie, Esq., U.S. EPA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	**Docket No. RCRA-05-2011-0009**
Carbon Injection Systems LLC;	)	
Scott Forster, President;	)	
Eric Lofquist, Vice President	)	
Gate #4 Blast Furnace Main Ave	)	
Warren Township, OH 44483	)	
	)	
EPA ID No. OHR000127910	)	
	)	
Respondents.	)	

RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER AND ERIC LOFQUIST'S JOINT SUR-REPLY BRIEF

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CBI - REDACTED

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I. INTRODUCTION

Notwithstanding Complainant's vitriolic ad hominem attacks on Respondents, the crux of this case remains the parties' legitimate debate over the interpretation of a continually evolving set of inter-related and complex environmental regulations with regards to three products purchased for ultimate use as injectants in a blast furnace, specifically a phenol column bottom produced by JLM Chemicals and Unitene LE ® and Unitene AGR ® produced by International Flavors and Fragrances, Inc. ("IFF"). Complainant's Post-hearing Reply Brief (hereafter "Reply") is replete with exaggeration and innuendo, and appears to be more an exercise intended to elicit an imprudent emotional response than an actual evaluation of the facts. Perhaps in an attempt to further obfuscate facts and evade consideration on the merits, Complainant has resorted to attacking procedural matters that have no bearing on the issues that must be determined following the hearing.[1]

With respect to the merits, however, the first issue that should be determined is whether injectants used in a blast furnace are burned for energy recovery. If not, their use falls outside of U.S. EPA's jurisdiction under RCRA. This enforcement proceeding presents the first opportunity for an adjudication regarding the meaning of "burning for energy recovery" in the context of the use of injectants in a blast furnace since U.S. EPA last considered the issue in 1985. Contrary to the conclusions that U.S. EPA reached

[1] For instance, Complainant's objection that Respondent's Initial Post-Hearing Brief (hereafter "Respondents' Brief") was not limited only to issues responsive to issues raised by Complainant in its own initial post-hearing brief is without merit. This issue was addressed immediately after the Post-Hearing Scheduling Order was issued, at which time Respondents confirmed with Mr. Sarno that the August 1, 2012 Order was not meant to limit Respondents to addressing only issues raised in Complainant's initial brief. See Exhibit A attached hereto, e-mail exchange between Lawrence Falbe and Steven Sarno. Complainant also attempts to make an issue out of Respondents' compliance with 40 CR § 22.5(d). This point is also without merit as a redacted copy of Respondents' Brief has been filed with the Regional Hearing Clerk and served on both the Presiding Officer and Complainant.

back in 1985, the evidence introduced by Respondents in this case demonstrates, by a preponderance of the evidence, that injectants provide no useful, purposeful or substantial heat energy to the blast furnace. Complainant's evidence is insufficient, and instead, Complainant argues that its recycling regulation should be reinterpreted in a way that potentially would bring within the scope of RCRA any manufacturing operation that involves a chemical reaction. RCRA was never intended to intrude so far into the production process, and Complainant's arguments for such an extension should be rejected. Rather, it should be determined that injectants provide no useful, purposeful or substantial heat energy to the blast furnace, a ruling that would be dispositive of all of the issues in this case.

Otherwise, in order to prevail on this case, Complainant must establish the three products are wastes, therefore, hazardous wastes. The evidence proffered by Complainant is insufficient to make such a showing with respect to the Unitene products. Complainant also has the burden of proving that Respondents Eric Lofquist and Scott Forster individually are liable as operators of the former CIS facility, and lastly that its proposed penalty is appropriate. Complainant's evidence also is insufficient to meet these burdens. Particularly with respect to the exorbitant penalty proposed by Complainant, the fact is that Respondents acted responsibly and diligently in seeking a determination regarding application of the recycling exclusion, and abided by Ohio EPA's determination even though they continued to believe that determination was incorrectly reached. Not only is there no evidence of any intent to violate RCRA in this case, the evidence is that Respondents were proactive in their attempts to understand, and to comply with RCRA's prohibitions. For these reasons, and the reasons discussed herein and in Respondents' Initial Post-Hearing Brief, Respondents are entitled to a

ruling in their favor on all counts, and Complainant's case should therefore be dismissed in its entirety.

II. JURISDICTIONAL ISSUES

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

1. Burning for Energy Recovery Means Burning for the Purpose of Obtaining Substantial Useful Heat Energy.

Following the roadmap for regulatory construction set forth in In re Howmet Corporation, RCRA (3008) Appeal No. 05-04, 2007 EPA App. LEXIS 19 (May 24, 2007), leads straight to the conclusion that "burning for energy recovery" means exactly what Respondents say it means now, and exactly what U.S. EPA said it meant previously: burning for the purpose of obtaining useful heat energy or burning that provides substantial useful heat energy.

The plain meaning of burning, as aptly demonstrated by definitions quoted by Complainant in its Reply at p. 16, is the provision of heat, light and power. Professor Fruehan's scientific explanation of "chemical energy" in terms of the "enthalpy" of the materials, expressed in terms of "joules" and "moles," which he accomplished using a flip chart at the hearing, if anything made clear that such concepts are well beyond the common understanding of the word "energy," either alone or in conjunction with the word "burning." (Tr., Vol. V, pp. 1098-1103). Indeed, as Professor Fruehan himself observed, "[w]e normally think about energy as heat energy." (Tr., Vol. V, p. 1117). In fact, the reason Professor Fruehan undertook to explain his concept of "chemical energy" at length using his flip chart was because, as he stated, "we don't often think, we always think of energy as heat and I want to explain what we mean by chemical energy." (Tr.,

Vol. V, p. 1098).[2] U.S. EPA's new interpretation of the phrase "burning for energy recovery" as encompassing the concept of the "enthalpy" of material which thermodynamics experts express mathematically in terms of joules, cannot reasonably be considered as falling within the common understanding of the word "energy" in the phrase "burning for energy recovery" in U.S. EPA's recycling exclusion.

In addition to looking at the plain meaning of the words, Howmet also instructs that a regulation should be interpreted so as to harmonize with and further, not conflict with, the objective of the statute it implements, and that the entire regulation must be read as a whole. In other words, context matters. Unfortunately, the language of the entire regulation and the language of the statute it implements provide no further guidance on the question. This led U.S. EPA, and the parties here, to the history of the proposed and final rules. In this regard, Complainant points to Congress' concern "with possible harm caused by hazardous waste use and reuse involving introduction of hazardous wastes to the air," and U.S. EPA's general "intent to regulate materials that are burned or incinerated." (Reply, pp. 10, 19). That history, however, reveals that U.S. EPA intended to address the concern over potentially harmful emissions by addressing burning wastes, particularly low BTU wastes, in incinerators and boilers, but that burning high BTU materials in industrial furnaces was much less of a regulatory concern and, moreover, presented jurisdictional issues that justified a balancing approach. Enforcement Guidance, 48 Fed. Reg. 11157, 11158-59 (March 16, 1983).

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[2] Respondents are not, as Complainant claims, attempting "to discredit the idea" that energy can take the form of chemical energy as well as heat energy. (Reply, p. 19). In this regard, Professor Fruehan and Dr. Poveromo are both correct. But, this "idea" is not what U.S. EPA meant by the word energy when it first promulgated, and later explained, what it meant by the phrase "burning for energy recovery." Complainant cannot change what was meant in order to further its enforcement objectives in this case alone without running afoul of the fair notice doctrine.

U.S. EPA, without equivocation, has stated that "burning for energy recovery" means burning for the purpose of obtaining useful heat energy or burning that provides substantial useful heat energy.

> These rules do apply, however, if hazardous wastes . . . are burned in industrial furnaces or boilers *to recover energy (i.e., to provide substantial, useful heat energy)* and for some other recycling purpose, even if energy recovery is not the predominant purpose of the burning. . . . Consequently, these rules apply where hazardous wastes are burned in boilers or industrial furnaces and provide *substantial, useful heat energy*.

50 Fed. Reg. 49164, 49167 (emphasis added). The context for this was U.S. EPA's need to both address the hazards associated with incineration and the burning of wastes in boilers, while avoiding any impermissible intrusion into the production process. U.S. EPA was able to balance these interests by requiring that, in situations involving material recovery, there must *also* be burning "to recover energy (i.e, to provide substantial useful heat energy)" in order for the activity to be regulated by U.S. EPA. (Id.). The meaning that Complainant now urges would completely eliminate this requirement and would blur the distinction between regulated burning activity and the normal use of materials (all of which, according to Professor Fruehan, have some "enthalpy") in the production process that is beyond U.S. EPA's jurisdiction. Thus, when the lengthy discussions in the various preambles to the proposed and final rules are considered in their totality, as required by Howmet, the meaning of the phrase "burning for energy recovery" clearly is burning for the purpose of obtaining useful heat energy or burning that provides substantial useful heat energy.

U.S. EPA's previous discussions in its preambles about blast furnaces, and the Cadence product, do not support Complainant's suggestion that burning for energy recovery should encompass the "chemical energy" that comes from the material inputs to

a blast furnace. When addressing the use of Cadence product, U.S. EPA observed that "Cadence product contribute[d] substantial heat energy to a blast furnace," that "injectants release substantial heat energy" and that "heat energy released from subsequent (i.e., outside the combustion zone) reactions of fuel injectant hydrocarbons is in fact substantial, intentional and useful[.]" 50 Fed. Reg. 49172-49173. Clearly, in 1985, U.S. EPA interpreted "burning for energy recovery" to mean burning for the purpose of obtaining useful heat energy or burning that provides substantial useful heat energy. Its mistaken belief that injectants in fact supplied substantial, useful heat energy provided one of the bases for its determination that the use of Cadence product in the blast furnace was regulated under RCRA. As Complainant now concedes, the U.S. EPA has a "more current understanding" of blast furnace technology today (Reply, pp. 26, 30).[3]

Finally, it should be noted that the interpretation Complainant now urges is inconsistent with the positions it previously has taken in this very case. In its March 16, 2012, memorandum in support of its Motion for Partial Accelerated Decision as to Liability, Complainant argued, at p. 40, that the injectants "provided heat energy, which replaces the heat energy of the displaced coke. . . . Heat is required to fuel the reactions." Similarly, in its April 2, 2012, memorandum in response to Respondents' Motion for Accelerated Decision, Complainant argued, at p. 26, that the "combustion of the hydrocarbons creates heat energy, which replaces the heat energy of the displaced coke." Again, in its April 13, 2012 reply to Respondents' Memorandum in Opposition to

[3] The rationale for U.S. EPA's determination that the use of Cadence was regulated was two-fold and its second basis, the inherently waste-like nature of Cadence, would not be affected by finding that pure material streams from a manufactured process such as those at issue here are not "burned for energy recovery" in a blast furnace.

Complainant's Motion for Partial Accelerated Decision, Complainant argued, at p. 21, "[t]he recovered energy takes two forms: the combustion of the hydrocarbons in the hazardous waste blend created heat energy, which replaces the heat energy of displaced coke . . . [.]" Complainant, throughout this case up to the very point when Professor Fruehan declined to rebut Dr. Poveromo's opinion that, in fact, injectants supply no useful or purposeful heat energy to the blast furnace, recognized that unless the injectants were burned for the purpose of providing substantial useful heat energy, at least in part, their use in the blast furnace would not be regulated under RCRA.

Focused solely on its narrow enforcement objectives in this case, and faced with unrefuted scientific and technical evidence that it largely concedes debunks U.S. EPA's prior misunderstanding of the nature and function of the blast furnace, Complainant now urges an interpretation that is contrary to all of its previous interpretations, including its previous positions taken in this very case. For these reasons, Complainant's present interpretation that it urges here is entitled to no deference, and it should be rejected.

2. Injectants Provide No Substantial Useful Heat Energy to a Blast Furnace.

a. Injectants Do Not Replace Coke Used For Heat Energy.

Complainant's argument that injectants supply useful heat energy to the blast furnace is too simplistic. Essentially, Complainant argues that because coke supplies the heat energy needed for the chemical reactions in the blast furnace to occur, and because injectants replace coke, then injectants must therefore supply heat energy too. The flaw in this approach, and in Professor Fruehan's entire testimony, is that it fails to distinguish between the three roles that coke performs in the blast furnace and it fails to recognize that injectants are not, in fact, a substitute for *any* amount of coke that is performing two of those roles. Injectants only replace a relatively small portion of the coke that provides

reductants. Injectants do not replace any of the coke that provides heat, and they do not replace any of the coke that provides structure. (Tr., Vol. XI, pp. 2538-2539). Injectants are utilized only for their material value, and not for their thermal energy value. Dr. Poveromo's testimony in this regard is absolutely clear:

> Q. Given the explanation that you've given us and based on your experience, do you have an opinion regarding whether liquid hydrocarbons are injected into the blast furnace for the purpose of obtaining heat energy?
>
> A. No. No. It's really for a material, a chemical reactant.
>
> Q. When injectants are used in the blast furnace, are they used for their thermal energy?
>
> A. No.
>
> Q. If oil injectants are used in the blast furnace as a substitute or a replacement for coke, what is their purpose?
>
> A. Their purpose is basically to fulfill some of the chemical role of coke. They can['t][4] fulfill all three roles of coke but at least that chemical role they can make a big dent in the amount of coke that's needed for its chemical role. . . .
>
> Q. But even if we just limit the question to that raceway zone, do injectants produce heat and thermal energy in that zone?
>
> A. On a net basis, no, no.

(Tr., Vol. XI, pp. 2554-2555). Dr. Poveromo's opinion testimony regarding these facts was not refuted. Indeed, Professor Fruehan agreed. (Tr., Vol. V. pp. 1180-1181).

Complainant argues that other aspects of Dr. Poveromo's testimony, at Tr., Vol. XI, pp. 2570-2571 and 2573 (Complainant's Reply Brief, p. 19) support Complainant's contention that injectants provide "sensible heat energy," and that this is sufficient to amount to "burning for energy recovery." Complainant completely mischaracterizes Dr.

[4] See, Parties' Motion to Conform Transcript and August 15, 2012 Order on Motion to Conform Transcript granting the motion with modifications.

Poveromo's testimony. In fact, Dr. Poveromo testified injectants do *not* provide sensible heat energy and that the "sensible heat energy used to fuel reactions and to preheat materials" comes from combustion of *coke*, not injectants:

> Q. So the focus of your explanation today is the injectant isn't a source of sensible heat; is that right?
>
> A. Yes. Yes.
>
> ***
>
> Q. If we raise the gas temperature in the raceway to about 3500 degrees by adding oxygen and the gas leaves the top of the furnace at a temperature between I think 300 and 400 degrees we talked about?
>
> A. Yes. Yes.
>
> Q. Isn't this sensible heat energy used to fuel reactions and to preheat materials.
>
> A. Yes, but it's the oxygen is really getting its, it has to combine with the coke carbon to do this so once again I'm trying to differentiate between the role of coke and the role of the injectants on the net energy balance in the raceway.
>
> ***
>
> Q. Going back to my question about injectants in the raceway?
>
> A. Yes.
>
> Q. I asked you the question about what if you add oxygen. If you leave out an oxygen as your additive and you get the injectants in the raceway to a temperature of 3500 degrees and the gas leaves the top of the blast furnace at 300 to 400 degrees, doesn't this mean that sensible energy from the injectants is being used in the blast furnace?
>
> A. No. I really explained the heat balance and the heat balance is, as Professor Fruehan explained, when you have these disassociation reactions, you actually create more moles of reducing gas than a gaseous reductants in the first place and you have to heat up those moles, those additional moles of reducing gas to the raceway temperature so you really have to provide that energy from somewhere else. The somewhere else is the burning of coke or increased hot blast temperature or decreased blast moisture. That's

> the heat balance. It's very hard to talk about this without talking about the raceway heat balance, so you have to really focus on that calculation.

(Tr., Vol. XI, pp. 2572-2577). Professor Fruehan's references to generic "industry standard" heat balances for blast furnaces, which also were referenced by U.S. EPA in its Cadence discussion, are simply inadequate to answer the question. Dr. Poveromo's examination of the heat balance of the raceway, however, demonstrates that injectants, in fact, supply no heat to fuel the blast furnace.

Perhaps in recognition of the correctness of Dr. Poveromo's opinions, Complainant advances an alternative theory in an attempt to show that the purpose for using injectants includes providing substantial useful heat energy, at least hypothetically, through the possible capture and use of top gas for fuel.[5] (Reply, p. 20). Complainant, however, cannot support this argument with any facts. Complainant cites to testimony from Dr. Poveromo to suggest that blast furnace top gas can be used as a valuable fuel. However, Mr. Poveromo did not testify that this was done at the WCI plant. (See, Reply, pp. 19-20; Tr. Vol. XI, pp. 2570-2571). In fact, contrary to its own argument on this point, Complainant takes the position in this case that emissions from the WCI blast furnace were in fact *not* captured. (Reply, p. 78). Complainant's position on the facts is inherently contradictory and it should not be heard to argue both sides of the same coin.

Moreover, as explained in more detail in Respondents' Joint Brief, the generation of top gasses is not purposeful, and in any event is not affected in any way, including volume or composition, by the use of injectants. (Tr., Vol. X, p. 2447-2448; see Tr., Vol. X, pp. 2443-2447; Tr., Vol. XI, p. 2578). Complainant did not refute these facts. There

[5] Complainant apparently has retreated from an argument it tentatively advanced that the removal of carbon in the steel making process somehow constitutes the use of injectants for their thermal energy. Complainant apparently now recognizes the chemical reactions that take place in a basic oxygen furnace as simply that -- chemical reactions. See, Reply, p. 17.

simply is no factual support for Complainant's claim that *injectants* supply substantial useful heat energy by virtue of the fact that blast furnaces generate top gasses.

The points raised in Complainant's Reply Brief are without merit. They are insufficient to rebut the overwhelming evidence that demonstrates that, despite what U.S. EPA mistakenly understood in 1985, injectants used in a blast furnace are not burned for the purpose of obtaining useful heat energy or for providing substantial useful heat energy. Accordingly, they are not burned for energy recovery and are not subject to RCRA regulation. For these reasons, Respondents are entitled to a decision in their favor which finds that no RCRA violations occurred.

b. Blast Furnace Injectants Do Not Meet Any of U.S. EPA's Stated Criteria for Being Burned for Energy Recovery.

Even if Complainant was correct that injectants supplied some amount of useful heat, their use in the blast furnace would not come within U.S. EPA's jurisdiction. In its preamble to the final rule, U.S. EPA sets forth three criteria to be considered when determining whether RCRA jurisdiction exists over burning. Complainant selectively omits mention of these criteria when quoting from the same pages of the preamble. (See, Reply, pp. 20-21).

> [W]hen an industrial furnace is used for material recovery and the secondary material being burned is (a) Not ordinarily associated with the furnace (for example, organic still bottoms), (b) different in composition from materials ordinarily burned in the unit (as when the secondary material contains Appendix VIII hazardous constituents different from, or in concentrations in excess of those in materials ordinarily burned in the furnace, or (c) burned for a purpose ancillary to the chief function of the furnace, we think that RCRA jurisdiction over the burning exists.

50 Fed. Reg. 614, 630-631.

The blast furnace injectants here do not meet any of these criteria for establishing RCRA jurisdiction. First, the injection of hydrocarbons into blast furnaces at the tuyeres

has been part of the normal iron making process for over half a century. Experts from both sides testified to this. (Tr., Vol. V, pp. 1080-1081; Tr. Vol. X. p. 2389). As well, liquid hydrocarbons in the form of various oil products have been traditionally used as injectants, as have natural gas, pulverized coal and an array of less common high-carbon containing materials, such as waste plastic. (Tr., Vol. V, pp. 1081; Tr., Vol. X, pp. 2395-2396). The oil products that are the subject of this case (unlike Cadence product) contained no hazardous constituents different from, or in concentrations in excess of those in materials ordinarily burned in a blast furnace including phenol and chlorine. (Tr., Vol. X, pp. 2448-2456; Vol. XI, pp. 2558-2568; See also, March 29, 2012, Declaration of Joseph Poveromo, p. 10; April 2, 2012, Declaration of Frederick Rorick, pp. 7-8). Indeed, the testimony at the hearing was that the materials that are the subject of this case, which were the products of controlled manufacturing processes, contained fewer levels of such constituents. (Tr., Vol. XI pp. 2558-2563). Finally, the injectants were used to produce reductants, a necessary ingredient for the reduction of iron ore. Without reductants, a blast furnace could not function. (Tr., Vol. V, pp. 1082; Tr. Vol. XI, pp. 2538-2539). Without question, the purpose for which the injectants were used was not ancillary to the chief function of the blast furnace. Because injectants here (a) are ordinarily associated with blast furnace operations, (b) are not different in composition from materials ordinarily used, and (c) are not burned for a purpose ancillary to the chief function of the blast furnace, RCRA jurisdiction over their use does not exist. Accordingly, Respondents did not violate RCRA, and they are entitled to a ruling in their favor on all counts of the Complaint.

3. The Recycling Exclusion Applies In This Case.

In its Reply, Complainant does not contest that the injectants were used as an ingredient in an industrial process to make a product when they were used in WCI's iron making blast furnace. (Reply, p. 31). Complainant simply argues that, if they were burned for energy recovery, as Complainant argues they were, then OAC 3745-51-02(E)(1)(a) is inapplicable. It follows, of course, that if the injectants were not burned for energy recovery, then the recycling exclusion, OAC 3745-51-02(E)(1)(a), is applicable. Complainant does not dispute this.[6] Accordingly, for the reasons discussed above, and for the reasons discussed in Respondents' Brief, it should be determined that the JLM and IFF materials were ingredients in an industrial process used to make a product and as such, their use falls within the recycling exclusion of RCRA, OAC 3745-51-02(E)(1)(a), warranting a finding for Respondents on all counts in the Complaint.

B. Complainant Has Failed To Meet Its Burden To Prove That The Unitene Products Were Solid and Hazardous Wastes.

1. Complainant's Interpretations Of Hearsay Evidence That Is Controverted by Sworn First-Hand Testimony Is Insufficient to Meet Complainant's Burden of Proof.

Initially in its Reply, Complainant relies heavily on the fact that Respondents have the burden of proof to show that the use of certain injectants in the WCI Steel blast furnace did not constitute "burning for energy recovery" under the RCRA regulations. Subsequently, however, Complainant studiously avoids acknowledging that when it comes to the threshold question of whether the IFF Unitene products were solid or hazardous wastes, the shoe is squarely on the other foot, and Complainant has the burden of proof.

[6] Complainant's reference to Respondents failing to meet their burden of proof as to the application of the recycling exemption pursuant to the "tangible" requirement of In re: Zaclon Inc, et al., is a red herring. The record is replete with examples of contracts for use of the products including those produced by IFF for other customers. (See CX9, pp. EPA 7256-7275). Rick Murray even testified that he has to compete with other customers to obtain the IFF products which were in demand. (Tr., Vol. IX, p. 2102).

As stated in Respondents' Brief, Complainant's attempt to prove that the Unitene materials were solid and hazardous wastes falls short of the mark. Even if the numerous complex issues and copious evidence and testimony in this case implicate a tenuously close outcome, Complainant's case must fail, as it must prove by the preponderance of the evidence that its interpretation of the facts and the regulations applied to those facts clearly shows that the IFF Unitene products were hazardous wastes. Indeed, while Complainant expresses confusion regarding why Respondents focused on the fact that IFF is not a party to this action (Reply, p. 33), Respondents' point was that the overall lack of compelling evidence (much of which was hearsay) and significant ambiguity and uncertainty surrounding much of the information that Complainant obtained from IFF, works against Complainant, as the party which bears the burden of proof. Complainant's missed opportunities to develop further evidence or clear up the many ambiguities that are apparent in the record should not be rewarded.

Ironically, Complainant cites the voluminous documentary evidence it introduced into the record to make its case (Reply, pp. 33-34), but fails to acknowledge that these documents were all introduced as hearsay through Complainant's witness Mr. Beedle, who predictably presented them through the prism of his own interpretation. These documents and Complainant's interpretation were challenged not only by Respondents' experts and witnesses, but by IFF's witnesses and representatives through various letters, depositions and live testimony. Yet, even where Complainant acknowledged a discrepancy between its interpretation of an IFF document as compared to the sworn testimony of an actual IFF witness, Complainant's only recourse is to attack the credibility of such testimony. Bald claims of bias and other such unsupported aspersions

are not sufficient to overcome the greater evidentiary weight of such evidence, and Complainant's arguments based on such contradicted evidence must fail. [7]

Complainant misses another critical point concerning Respondents' focus on the failure of Complainant's representatives and experts to engage in sufficient research and fact-finding to support their case by disregarding the fact that Complainant, not Respondents, has the burden of proof. [8]

Complainant's witnesses and experts must prove to the Court that the evidence in the record supports its premise that Unitene was a solid and hazardous waste. But, as the party with the burden of proof, Complainant cannot simply stand on the interpretation of hearsay documents by Mr. Beedle or its retained expert Mr. Clark, in the face of contradictory testimony and other evidence presented by Respondents, especially where such live and sworn testimony directly refutes the second-hand interpretation offered by Complainant's experts. The failure of Mr. Beedle and Mr. Clark to perform any independent research or investigation into IFF's manufacturing processes and activities, and their heavy reliance on their own interpretation of IFF's hearsay documents, simply cannot overcome Complainant's burden of proof when contradicted by the testimony of IFF's witnesses, who the Court had the opportunity to observe, and who presented no

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[7] Complainant's suggestion that IFF's witnesses cannot be believed simply because they are "directly aligned" with Respondents and face potential enforcement action over Unitene as well, should be rejected. (Reply, p. 36). Complainant's tendency to credit IFF's testimony that it finds favorable, while in the next breath reject testimony it finds inconvenient, illustrates that Complainant has no valid challenge to the credibility of the IFF witnesses.

[8] Complainant cannot seriously contend that Mr. Beedle fairly considered the detailed information provided by IFF's in-house and outside counsel in a good faith attempt to evaluate it. (Reply, p. 34). Mr. Beedle testified that he considered all of these communications to be "revisionist" letters by attorneys that did not merit additional information requests or even a follow-up call to IFF's counsel to ask any questions. (Tr., Vol. IV, pp. 817-823).

reason for the Court to doubt their credibility and honesty, or their technical knowledge and competence.

2. The Preponderance of the Evidence Proves that the Unitene Materials Were Products or Co-Products, Not By-Products, and Therefore Were Not Solid or Hazardous Wastes.

Complainant makes much of the various factors enumerated in In re Brenntag Great Lakes, LLC, RCRA 05-2002-0001, 2004 WL 1328663 (June 2, 2004), relevant to whether materials should be deemed by-products or co-products under the RCRA regulations, implying that Respondents have ignored the applicable criteria. (Reply, pp. 32-47). While not citing directly to Brenntag, Respondents address all of the so-called Brenntag criteria in the context of discussing the applicable RCRA regulations under 40 CFR 261. (See Respondents' Brief, pp. 35-38). Complainant's suggestion that Respondents have ignored the relevant criteria simply because Respondents did not specifically invoke Brenntag in their brief is without merit.

As to the specific application of the relevant co-product/by-product factors to this case, Respondents have well-addressed those in their Brief (See Respondents' Brief, pp. 35-40) and will not repeat those arguments here, except to address and refute below some of the more egregious mischaracterizations and hollow arguments advanced by Complainant in its Reply.

a. Unitene Was Intentionally Produced as a Product or Co-Product.

Complainant attempts to draw arbitrary boundaries between certain of IFF's actions that Complainant contends illustrate IFF's lack of intention to produce Unitene, and other actions cited by Respondent that Complainant contends only show IFF's intent to market, sell, store, ship or otherwise manage –but not produce—the product. Contrary

to Complainant's artificial distinction between intent to produce and intent to sell (or store, or anything else), Respondents submit that the overall history and range of activities that IFF undertook in relation to Unitene must be examined to divine its actual "intent" with respect to the Unitene materials from the regulatory perspective.

First, it should be noted that the question of whether Unitene was "produced intentionally" is only one factor among several that the parties agree are relevant to the co-product/by-product distinction, and that this particular factor does not appear in the definition of "by-product" itself under 40 CFR 261.1(c)(3). Instead, the "intent" language appears in the preamble to the solid waste regulations and appears along with other factors, such as whether the material is "residual" in nature and is "unfit for end use without substantial processing." Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614-01, at 625 (proposed January 4, 1985)(to be codified as 40 CFR Parts 260, 261, 264, 265 and 266).

The scope of what activities or criteria the U.S. EPA intended to consider with respect to the phrase "produced intentionally" is not clear. Thus, as discussed in Respondents' Brief, at pp. 40-42, central to this issue is whether materials that are already being produced by a facility as part of an existing process to produce another material can be re-purposed into useful co-products, or whether such materials, despite being perfectly useful, unspent and uncontaminated, must forever be deemed "by-products" and subject to an extremely strict and completely unnecessary regulatory framework. Complainant's chief argument in this vein seems to be that IFF did not begin with the "intent" to produce Unitene as a isolated product. (Reply, p. 37). Respondents have not suggested otherwise. [redacted]

[redacted] What is not clear, is why Complainant insists that a perfectly useful material cannot be intentionally developed as a product by a company out of materials that were already being produced simply because that material was once thrown away for lack of a realized use. Complainant is unable to cite to any authority for the proposition that a specific co-product has to be the most profitable product produced from a multi-product process, or even profitable at all, to qualify for the "intentionally produced" criteria. Most importantly, none of the authority cited by Complainant, including Brenntag, comes close to hinting that IFF's Unitene products should be deemed by-products simply because they are produced as part of the overall Iso-E-Super production process.[9]

In Brenntag, the respondent Milsov Corporation (n/k/a Brenntag), a chemical distributor, contended that aqueous isopropyl alcohol (IPA) it purchased from 3M Corporation was a co-product of 3M's production of an adhesive product containing glass fibers, and not a hazardous waste. The aqueous IPA that was sold to Milsolv had begun life as virgin anhydrous IPA, which was used in 3M's adhesive production process to strip water away from the adhesive, and thus had become 'contaminated' with water as part of this process. 3M sold the aqueous IPA to Milsolv as a 'product' shipped on bills

[9] As noted previously, the notion that there are situations where "a number of co-products are being produced" has been explicitly recognized in the preamble to the definition of solid waste regulations. Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614-01, at 618 (proposed January 4, 1985)(to be codified as 40 CFR Parts 260, 261, 264, 265 and 266).

of lading. Milsolv, in turn, used a dehydrator to remove some of the water from the aqueous IPA, thereby increasing the percentage of isopropyl alcohol to water in the mixture, which Milsov then re-sold to its own customers.

The presiding officer in that case determined the aqueous IPA that Milsov bought from 3M Corporation was a spent material that was "not a constituent of the material being processed; it was added to the glass fibers being processed for use in the process, and was subsequently removed when it was no longer effective." Brenntag, at *11-12. The presiding officer also noted that "the aqueous IPA which is the subject of this case is quite unlike the co-products such as 'kerosene, asphalt and pitch from petroleum refining' ... those co-products are generated from the constituents in the materials being processed." Id. Thus, when the aqueous IPA left 3M, it was deemed a spent solvent, not a product or co-product of the 3M adhesive; therefore issues such as management of the material after production did not require consideration.

No analogy can be made with the issues in this case to the facts in Brenntag. Unlike the IPA in Brenntag that was used in the 3M production process, [redacted]

There has never been any evidence, testimony, or a suggestion that the Unitene materials were "spent" in any way, and thus, the Brenntag decision has no application here. If anything, the analysis in Brenntag supports Respondents' position that the

management of a material as a product could have dictated a different outcome in Brenntag if the material had not clearly been a "spent solvent."

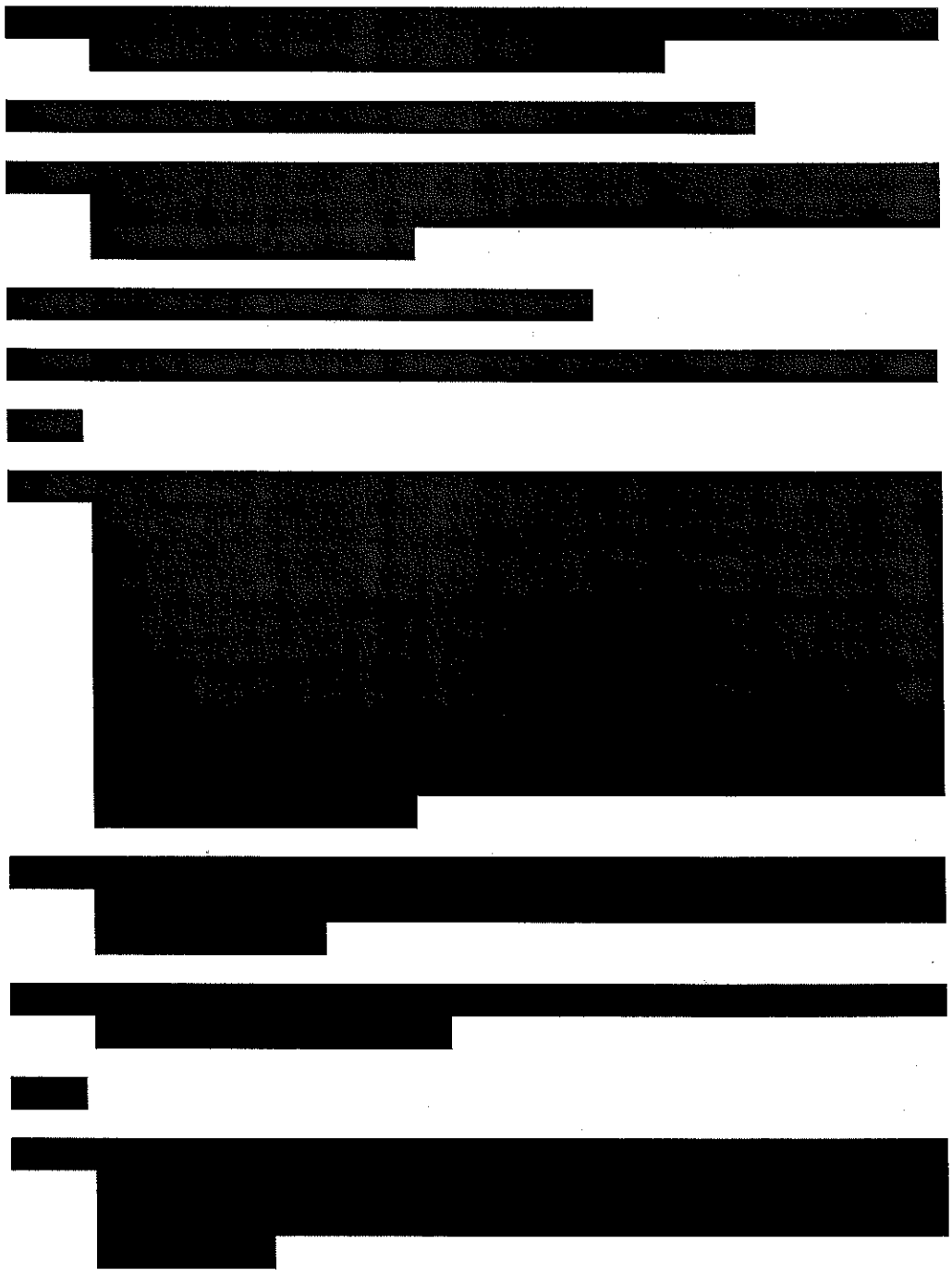
b. IFF's Internal References to Unitene As A "By-Product" Are Inconsequential.

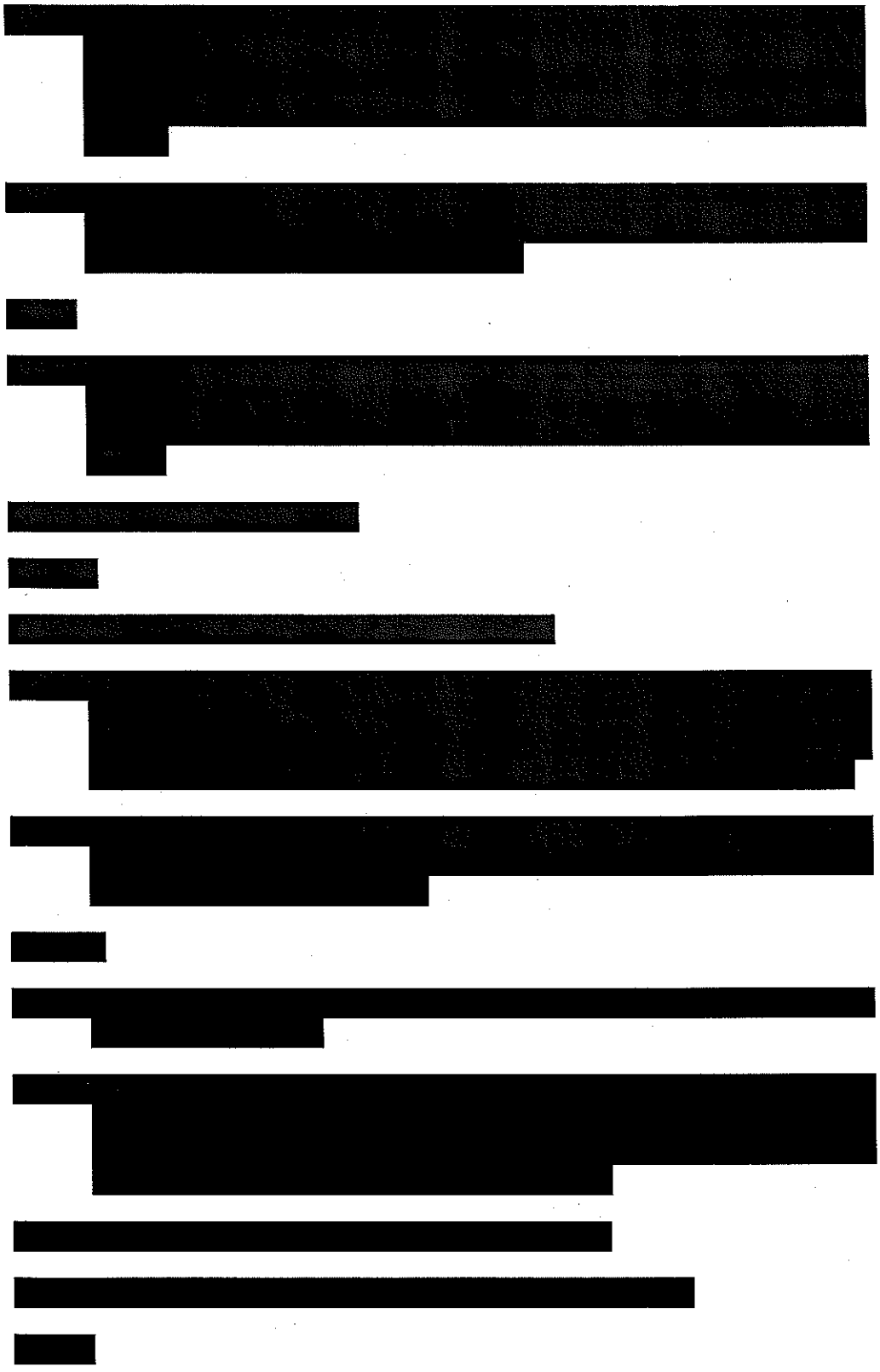
Complainant continues to assert that IFF's internal references to Unitene as a "by-product" are significant and indicate what IFF thought was the true characterization of such material. (Reply, pp. 38-39). Respondents have consistently argued that that factory-floor references that are not made with clear reference to, or intending to apply, the RCRA regulations, are simply meaningless as to the issue of whether the Unitene materials met the regulatory definition of "by-product," given the nuances and intricacies of that definition under 40 CFR 261.1 and the associated case law and guidance. To find otherwise would be the equivalent of deeming a specific material a "hazardous" waste under RCRA because a facility employee considered a material noxious-smelling and referred to it as "hazardous" on the shop floor, regardless of whether the material actually met the very specific requirements to be deemed first a solid, and then a hazardous, waste.

[redacted]

However, as Complainant is well aware, [redacted] Moreover, Ms. Barry clearly explained in her

deposition that she had by no means intended to make a final pronouncement regarding her regulatory assessment of the processing of Isopre Lites at the Jacksonville plant, and in fact readily admitted she did not have enough information about the specific process to make such a call at that time:





[redacted]

It is clear that Complainant blatantly mischaracterizes this testimony and the meaning of the referenced document. Moreover, to follow Complainant's logic would suggest that IFF knew internally that selling Unitene, knowing it was a regulatory by-product, was a violation of RCRA. The evidence in this case consistently reflects that IFF ultimately decided that developing and selling Unitene as a useful product did *not* run afoul of RCRA, even for the specific use for which it understood that CIS was purchasing its Unitene products. [redacted]

[redacted]

Thus, it would seem clear that although IFF internally, at times, referred to the Unitene materials as by-products, it also referred to them as products, and more consistently described them as products when the context was a regulatory-oriented analysis.

c. Unitene Did not Undergo "Substantial Processing."

Complainant asserts that the process of dewatering Unitene conducted by CIS at its Warren facility constitutes "substantial processing" under the applicable criteria. (Reply, p. 45) First, Complainant mischaracterizes the testimony in the record concerning dewatering procedures sometimes employed at CIS with respect to some product shipments. Second, Complainant attempts to reduce the word "substantial" to mean "next to nothing." Complainant cannot meet its burden of proof on this issue by so mischaracterizing either the facts or the law.

First, contrary to Complainant's misleading interpretation of the testimony at hearing, water was never removed from the Unitene materials by CIS. Complainant grossly mischaracterizes Robert Malecki's testimony to bolster its false assertion that the Unitene materials were dewatered. The record clearly only shows that CIS *could* remove excess water from any shipment of any materials, not that it did so for the Unitene products specifically. As is clear from the hearing transcript, the question posed to Mr. Malecki was in regard the capabilities of the CIS facility generally:

> Q: And did you have any means at the facility to off-load water as a way to diminish the water content?
>
> A: Yes.
>
> Q: And what did you do?
>
> A. You could open the truck when the material came to the pump, there's a sump underneath the pump stations with filters and you could visibly watch the water pour down into the sump. When the water stopped, you would get oil. You'd turn on the pumps and off-load it.

(Tr., Vol. IX, pp. 2200-2201). The full context of the testimony makes it clear that Mr. Malecki was not speaking about the Unitene products.[10]

[10] Complainant contends that even Dr. Sass stated that "CIS removed water from the Unitene shipments" (Reply, p. 46), but contrary to Complainant's claim, Dr. Sass's written testimony does not reference CIS. Rather, [redacted]

Similarly, Complainant completely ignores Mr. Malecki's later testimony that the Unitene was "...great stuff. Good material" with "moisture that [was] generally always below spec." (Tr., Vol. IX, pp. 2206-2207). Complainant also ignores former plant manager John Dzugan's testimony in response to a question regarding the water content of the Unitene material in which he stated the Unitene materials were "almost 100 percent material." (Tr., Vol. IX, pp. 2271). As the testimony from these former CIS employees show, there is no direct evidence that the Unitene materials had to be dewatered in order to meet WCI specifications. Complainant's position is based on pure conjecture and speculation, and is not sufficient to establish that CIS ever, in fact, removed water from any Unitene product.

Second, even if dewatering of any Unitene was conducted by CIS, such a procedure does not constitute "substantial processing." A material is considered a by-product if, among other criteria, it is unfit for end use without substantial processing. (Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614-01, at 625 (proposed January 4, 1985)(to be codified as 40 CFR Parts 260, 261, 264, 265 and 266)). There is no regulatory definition of what is considered substantial processing, nor is there U.S. EPA guidance or case law that offers clarity as to what substantial processing would entail. Complainant asks the Court to essentially ignore the adjective "substantial," by defining it to include anything beyond using the material strictly "as-is."

Significantly, in this context, the notion of "processing" implies "doing something" to the material itself. Removing water does not alter the Unitene. Since

[redacted] Complainant conveniently disregards Dr. Sass's opinion that dewatering does not amount to "substantial processing" in any event. (Id.)

Unitene is a mixture of hydrocarbons, it is insoluble in water, and removing the excess water would be a simply matter of physical separation, aided by gravity. It is not changing the form of the Unitene itself; nor is it recycling or reclaiming materials or contaminants from the Unitene itself.

3. IFF's Historical Disposal Of The Unitene Component Materials Does Not By Itself Make Unitene a Waste.

Complainant's assertion that because, Unitene does not differ from the material that was once disposed of as waste, "Unitene remains a solid waste." is not true. (Reply p. 41). Further, Respondents do not argue, as Complainant asserts, that the act of selling the material to another party converts a waste material into a non-waste material. (Reply, p. 40). Rather, the entire point of Respondents' argument is that, under RCRA, because the definition of waste turns on whether such material was discarded, the determination that a material is a "waste" must be a conclusion that is reached after analysis of the relevant facts and factors. It is not, as Complainant would prefer, an *a priori* presumption that must be disproved based on a company's prior management of that type of material, such as in this case where the Unitene component materials were discarded not because they were intrinsically waste-like, but simply because at one time there was no identified use for those materials.

Complainant's 'once a waste, always a waste' mantra has no support. Complainant has yet to cite to a shred of authority that suggests that once an entity like IFF disposes of otherwise useful material as a waste for lack of a market or use, the later identification or discovery of such a market or use is irrelevant to the regulatory determination of this material going forward, and it must still forever be deemed "waste." In re Howmet Corp., RCRA 06-2003-0912 (April 25, 2005), is inapposite because, like

the material in Brenntag, *supra*, the KOH that was the subject of Howmet was deemed to be "spent" material. Thus, the concern in Howmet was the regulatory implication of the respondent's attempt to re-use spent solvents multiple times, something that is not at issue here.

[redacted]

[redacted] Thus, the more reasonable interpretation of these events is that Complainant is wrong. But, at the end of the analysis, Complainant once again misses the bigger picture, which is that regardless of what the materials were that comprised Unitene, IFF's management of these materials prior to development of the Unitene products is not dispositive of the appropriate regulatory status of these materials after their development, when they were sold and no longer discarded.

4. U.S. EPA Cannot Simply Disavow Its Prior Determination Letters.

While Complainant ironically cites use of the RCRA Penalty Policy as important for maintaining consistency in the RCRA program, its counsel in this particular case surprisingly disavows the enormous body of guidance and prior determinations as to the nature of co-products and by-products when it becomes inconvenient.[11] While Complainant is correct that U.S. EPA contemplated that determinations of co-product and

[11] Ironically, Complainant seems to have no such concerns when it comes to citing U.S. EPA's 1985 preamble regarding the Cadence product as important precedent.

by-product would necessarily be case-by-case determinations, that does not mean that such prior determinations regarding similar materials and circumstances should be simply ignored.[12] As previously noted in Respondent's Brief, Complainant's expert Mr. Clark surprisingly failed to review any of these determination letters to see how U.S. EPA itself has analyzed the co-product/by-product issues, as well as the specific rulings made in analogous circumstances. (Respondents' Brief, p. 43).

It is important to note that Respondents do not suggest that they relied on any of these specific letters to aid them in any kind of pre-NOV analysis of whether the Unitenes were regulatory products or by-products under RCRA. Indeed, one of Respondents' fundamental points is that CIS had no reason to even be concerned with the "by-product" issue during the course of purchasing Unitene from IFF. The question simply never came up, and despite Mr. Beedle's suggestion that CIS's purchase of Unitene should have been subjected to a "super precautious standard" (Tr., Vol. IV, p. 944), there was nothing inherent or apparent about Unitene that suggested that CIS should have investigated any such concerns or issues.

5. Complainant Cannot Remedy the Insufficiency of Mr. Clark's Testimony by Attacking Dr. Sass.

[12] Complainant's implication that the general public is somehow on notice that such letters have no precedential value and cannot be relied upon is belied by the detailed overview of the issue provided on EPA's website, with hyperlinks directly to many of the guidance letters in evidence in this case -- with no apparent disclaimers or warnings that such letters are, according to Complainant's legal representatives here, next to meaningless. In fact, not only does U.S. EPA intend the regulated community to review and rely on these letters, it hosts an active "ask a question" portal where questions can be submitted online, presumably for guidance that would be helpful in navigating these issues. See http://waste.supportportal.com/ics/support/default.asp?deptID=23023; http://waste.supportportal.com-/link/portal/23002/23023/Article/22038/What-is-a-by-product-and-what-is-its-regulatory-status-when-reclaimed; http://waste.supportportal.com/link/portal/23002/23023/Article/14320/At-what-point-does-an-unused-commercial-chemical-product-become-a-solid-waste.

Complainant struggles to turn Mr. Clark into something he is not: a chemist experienced in working with terpenes such as Unitene AGR and Unitene LE. In contrast, Respondents' expert Dr. Sass, a Ph.D. analytical chemist, testified to his experience working with terpenes and submitted extensive written testimony explaining in great detail the chemical properties of such substances and the relevance to the materials at issue in this case. (RX 130). When challenged by Complainant's counsel at hearing, Dr. Sass had no difficulty identifying which chemicals used at the IFF Augusta facility were terpenes, as well as walking the Court through the entire Unitene production process, beginning with the starting point of crude sulfate turpentine. (Tr., Vol. VII, pp. 1607-1609; 1625-1626; 1667-1668). Dr. Sass also had no problem explaining the principles of gas chromatography and explaining why the chemical certificates of analyses of the Unitene products showed a large percentage of "sum hydrocarbons" and broke out only smaller percentages of specific terpenes, a conundrum that seemingly confused both Mr. Clark and Mr. Beedle.[13] (Tr., Vol. VII, pp. 1611-1623). Dr. Sass also aptly explained why the specifications set by IFF for the Unitene products were fairly broadly based, which Complainant's witnesses also struggled to understand. (Tr., Vol. VII, pp. 1636-1638).

In its desperation to discredit Dr. Sass's opinions and detailed analysis of the Unitene production process and nature of the materials, Complainant erroneously asserts that:

[13] It is also worth noting that Dr. Sass pointed to the chemical certificates of analyses as further proof that the Unitenes did not contain detectable levels of MEK or ethylbenzene, which would have shown up on the gas chromatograph. (Tr., Vol. III, pp. 1619-1622).

> Nowhere in his written or oral testimony does Dr. Sass state that he reviewed any of the materials related to IFF's processes. Rather than focusing on the facts at issue, as EPA's experts have done, Dr. Sass chose to base his testimony exclusively on numerous technical papers describing the properties of terpenes. RX130 at p. 25 (a list of references attached to Dr. Sass' written testimony, which excludes any reference to IFF documents).

(Reply, p 35). Presuming that Complainant is not trying to purposely mislead, it apparently overlooked the reference on that same page of Dr. Sass's written testimony (RX 130) where Dr. Sass clearly cited the "IFF depositions, disclosures, and responses to EPA" as part of the materials he reviewed in his "References" section. Further, Dr. Sass's written and oral testimony was replete with references to the IFF documents, deposition testimony, and other materials he reviewed, as well as a detailed review of Complainant's own expert's opinions as set forth in Mr. Clark's prior declarations.

Finally, Complainant ironically attacks Dr. Sass for having significant experience with "only" two major terpene projects on his lengthy resume. (Reply, p. 48). This is exactly two more terpene projects than Mr. Clark can claim. In fact, Mr. Clark admitted that his only experience with terpenes at all came from working on the present case. (Tr., Vol. VII, pp. 1489-91). He would not call himself a terpene expert: (Id.) Complainant's assertion that Mr. Clark is "extremely well-qualified" to offer an opinion based on his general chemical engineering and process knowledge is fanciful at best. (Reply, p. 47). In contrast, Dr. Sass's extensive written and oral testimony, credentials, and experience should leave no doubts as to which expert's qualifications are better suited to the task at hand.

However, as explained in detail in Respondents' Brief, Mr. Clark's lack of credibility stems more from his lack of preparation and review, and the inconsistency of his opinions, than his lack of expert qualifications. First, Complainant can offer no

cogent explanation for the glaring fact that for all of Mr. Clark's belated idea the Unitene products are "distillation column bottoms" as contemplated by the solid waste regulations, this key opinion was present nowhere in Mr. Clark's first Declaration (Attachment A to Complainant's Memorandum in Support of Its Motion for Partial Accelerated Decision as to Liability). (See also Tr., Vol. VII, pp. 1541-1545; Respondents' Brief, pp. 46-49). The focus of Mr. Clark's opinion at that time was his theory of "malformed" isomers, which he later abandoned. Mr. Clark also did not suggest at that time that either Unitene product constituted a "residue" of any kind.

Once Mr. Clark concluded that equating the Unitene materials to "distillation column bottoms," was a stronger argument, he focused on this new theory and stopped talking about "malformed" isomers. (Tr., Vol. VII, pp. 1544-1545). However, Mr. Clark then ran into the problem that in the course of the manufacture of Iso-E-Super, the "good iso-precyclomone" that Mr. Clark believed was the only true product of this process, was a "bottom" in one of the primary stages of production. (Respondents' Brief, pp. 48-49). Thus, the fact that material is left in the "bottom" of a distillation column does not, in and of itself, dictate that such material is a by-product. Mr. Clark's "bottoms" opinion is inconsistent and subjective, and is not credible.

Mr. Clark's opinion that the Unitenes are regulatory by-products because they are "residual" suffers from similar flaws. The concept of "residues" was not mentioned in Mr. Clark's first Declaration. In Mr. Clark's First Supplemental Declaration (attached to Complainant's Response to Respondent's Motion for Accelerated Decision), recognizing that the common meaning of "residue" implies a physical substance being left behind (such as tank bottoms that must be scraped out of a vessel), he opined that the Unitenes contained "heavier constituents that would normally form a solid residue" that were

dissolved by other chemicals having a lower molecular weight. (Clark First Supplemental Declaration, p. 3). Thus, at that time, Mr. Clark's conjecture was that the Unitenes contained dissolved solids that, if distilled down far enough, would form the "residue" that would clearly show these materials were by-products. It was only the happenstance that these solids were still in a dissolved liquid form when they left the distillation column that prevented the Unitenes from resembling traditional "residues." (See Respondents' Brief, p. 51).

This new theory was just as quickly abandoned in favor of an even more watered-down proposition that whatever material might be left in a column, whether solid or liquid, was "residual," in the sense of being "left behind." (Tr., Vol. VII, pp. 1400-1401). From Mr. Clark's perspective, anything that does not eventually wind up in Iso-E-Super is therefore, "residual" because it is 'left behind' somewhere along the way in the process. (Tr., Vol. VII, p. 1401-1402). This new definition is scientifically meaningless, as it starts with the conclusion as to what the end product is, and working backwards, any other materials, no matter how useful or non-wastelike, are by definition "residual" and therefore, a regulatory "by-product." (Compare Dr. Sass's scientific analysis of the concept of "residue" in the distillation context, RX 130, pp.10-11).

Finally, Complainant once more unconvincingly tries to distinguish "bottoms" from a petroleum distillation column from the "bottoms" of the IFF columns, stating that if the Unitene columns were more sophisticated and separated into more distillate fractions like a petroleum product distillation column, then the very most "bottom" would contain significant residue. (Reply, p. 49, n. 13). Why this distinction makes any kind of difference is not explained, unless it is to suggest once again that if you continued to distill down Unitenes further and further, you would eventually wind up with solid

residue. What "might" happen if the circumstances regarding the production of Unitene were changed simply has no bearing on the actual distillation process and the fact that the "bottoms" of the Unitene columns contain no residue and are not "residual" by any reasonable understanding. Mr. Clark cannot, and does not, compare his concept of "still bottoms" to other residue-like substances listed in the solid waste definition preamble, which lists "still bottoms, reactor cleanout materials, slags and drosses" as examples of materials of a "residual nature." (Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614-01, at 625 (proposed January 4, 1985)(to be codified as 40 CFR Parts 260, 261, 264, 265 and 266)). Simply put, no matter how many times Mr. Clark recasts his opinions, he cannot escape the fact the Unitenes were not "generally of a residual character" as contemplated by the solid waste regulations.

6. The Unitenes Were Not Discarded Commercial Chemical Products.

As explained in detail in Respondents' Brief, [redacted]

In its Reply, Complainant equates this issue with Respondents' discussion of the "fuels" exception to the "burning for energy recovery" rule that discarded commercial chemical products are deemed to be recycled when they are burned for energy recovery. (Reply, pp. 53-54). The central question of whether use of the Unitene products as

injectants in a blast furnace constitutes "burning for energy recovery" has been addressed above. But, even presuming that Complainant prevails on that issue, Complainant must still prove that the Unitene materials were "discarded" commercial chemical products *before* they were burned for energy recovery. Complainant cannot skip a step and deem that simply by the end act of "burning for energy recovery," an unspent commercial chemical product has been discarded. This is a highly circular argument, and to adhere to Complainant's interpretation of the regulations would impermissibly expand U.S. EPA's jurisdiction to all manner of materials that were utilized in a way that U.S. EPA unilaterally decided was not the "normal" use of the product, regardless of whether they had first been discarded and could be regulated as solid wastes under RCRA.

7. Even if the Unitenes are Deemed To Be Solid Waste, Unitene AGR is not Characteristically Hazardous.

In the event that, despite Respondent's arguments and the evidence in the record, the Court finds that Unitene AGR is a solid waste, Complainant's assertion that Unitene AGR is characteristically hazardous must be addressed. (Reply, p. 56). Complainant's proffered support for this contention is seriously lacking, and illustrates once again the importance of Respondents' point regarding Complainant's lack of clear evidence on so many of these issues on which it bears the burden of proof.

a. Complainant Cannot Prove That the Flashpoint of Any of the Unitene AGR Shipments Received by CIS Was Ever Below 140°F.

First, to prove its contention that Unitene LE is characteristically hazardous, Complainant relies [redacted]

[redacted] This flashpoint is clearly non-hazardous. Thus, to make its case, Complainant must refute the accuracy of the Unitene AGR MSDS when it becomes inconvenient. (Reply, p. 56). It should be noted that Unitene AGR formed the large majority of the total Unitene shipments to CIS.

[redacted]

This assertion cannot carry the day for Complainant, for several reasons.

First, Mr. Shepherd was never asked when the flashpoint of Unitene AGR varied from the stated value, even though Complainant had opportunities both in deposition and on the witness stand to do so. Nor did Complainant ever attempt to test any Unitene AGR itself. It may be that Complainant was fearful of developing testimony that clearly would have shown that wide variation in flashpoint of Unitene AGR was a fairly isolated or short-lived issue that did not affect any shipments of Unitene AGR to CIS. But, since Complainant, the party with the burden of proof on this issue, chose not to ascertain any additional or more precise information, all that Complainant is left with is pure speculation about when and which, if any, of the specific Unitene AGR shipments to CIS might have dipped below the stated 174.99 °F. The testimony is clear that IFF had many other customers besides CIS for its Unitene products. Thus, because Complainant never established which shipments of non-standard flashpoint Unitene AGR were shipped (if indeed any were, which Complainant also failed to establish), and to which customers,

Complainant fails in its burden to proof to show that CIS received any shipments of Unitene AGR that may have dipped below 140°F.

[redacted]

[redacted] He certainly was not asked to perform any tests on any Unitene samples to determine its flashpoint. (Id.) As the party with the burden of proof, Complainant cannot rely on speculation regarding the flashpoint of Unitene AGR that was provided to CIS to prove that the specific shipments to CIS consisted of characteristically hazardous material. Thus, Complainant fails in its burden to prove that the shipments of Unitene AGR received by CIS were hazardous, and these shipments cannot form the basis for any liability or penalty to be assessed against Respondents.

b. The Waste Codes Assigned to the IFF Augusta Organic Waste Stream Do Not Indicate that the Unitenes Were Hazardous Wastes.

Second, Complainant complains that Respondents give short shrift to the fact that Unitene AGR was 'coded' as hazardous waste, and therefore was characteristically hazardous. (Reply, p. 57). For starters, whatever waste code may have been assigned to certain materials by IFF does not definitely prove it was hazardous waste any more than failure to properly code a material as hazardous waste would prove that material was not hazardous waste. Even Mr. Beedle had to admit to that. (Tr., Vol. IV, pp. 782-787).

[redacted] Unitene AGR is mentioned nowhere in the document. (Id.) Finally,

Complainant asserts that Respondents contended in their initial brief that IFF grossly miscoded "*every* industrial waste stream from the plant." Respondents intended to convey that Unitene AGR was miscoded because it was once included and disposed of with every other *organic* waste stream and that other materials in the plant, not the components of what became Unitene AGR, were responsible for codes F003, F005, D001 and D035. Thus, Complainant's litany of other industrial waste streams that IFF did code correctly is of no consequence.

c. MEK or Other Contaminants Were Not Present In Either Unitene AGR or LE.

Complainant insists that the testimony of its expert, Mr. Clark, proved that Unitene AGR contained Methyl Ethyl Ketone ("MEK").[14] (Reply p. 58). First, Mr. Clark's testimony in this regard is essentially hypothetical, as he states that "if MEK is in the water phase" (emphasis added), then some MEK could wind up in oils that are separated in the oil/water separator, and the oil/water partition coefficient of MEL "suggests" that such can occur. (Reply, p 59). At best, Mr. Clark believed that the circumstances of production of Unitene AGR are such that under the right conditions, it was "possible" Unitene AGR could contain some unspecified amount of MEK (see Tr., Vol. XII, p. 1462), but Mr. Clark cannot testify that any specific shipments of Unitene AGR that were received by CIS contained any MEK at all. Thus, Mr. Clark's speculative and inconclusive testimony is not enough to satisfy Complainant's burden of proof.

It is also significant that Complainant did not offer Mr. Clark to rebut the testimony of materials broker Richard Murray, who testified based on his personal

[14] Significantly, Mr. Clark did not testify that Unitene LE contains (or could contain) MEK.

knowledge regarding the development of Unitene by IFF and the question of whether MEK or other hazardous constituents could have been present in Unitene:

Q. Do you think there's any MEK, ethylbenzene or anything hazardous in Unitene?

A. No.

Q. Would you have sold Unitene to CIS if you thought it had MEK, ethylbenzene or any kind of contaminants in it?

A. I would not have sold it or shipped it.

Q. Why not?

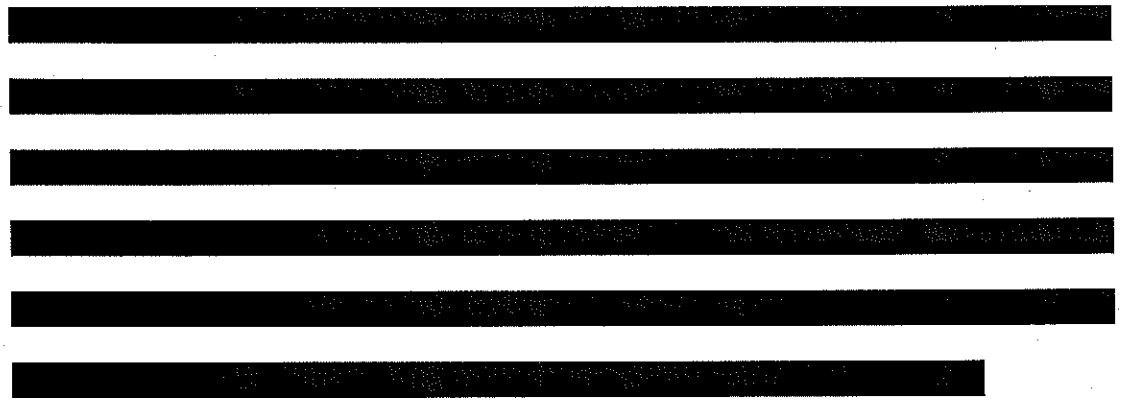
A. Got a vested interest in my business and I wouldn't want to put it in jeopardy. I wouldn't want to do that to a supplier. Integrity in the marketplace is hard to come by so I am not going to ship anything that is not what it's represented to be.

Q. Have you seen any documents that would suggest that there is any MEK or ethylbenzene or similar contaminants in Unitene?

A. No. The six, the six months to a year that was involved in developing that was to make sure that those, MEK, ethylbenzene, products like that were going to the organic waste where the terpene products were not.

(Tr., Vol. IX, pp. 2134-2135).

[redacted] The glaring problem with Mr. Clark's testimony is that he based his opinion only upon hearsay documents for which he was provided no context or explanation, leaving them open to misinterpretation. [redacted]



The Court had the opportunity to observe Mr. Shepherd's testimony and demeanor, and Respondents respectfully suggest that Mr. Shepherd clearly presented no reason to lead the Court to doubt the truthfulness of his testimony under oath at the hearing. Notably, not only did counsel for Complainant have the opportunity to cross-examine Mr. Shepherd on this veracity of this testimony, and did not, Mr. Clark apparently did not avail himself of the opportunity to review Mr. Shepherd's testimony in this regard and either attempt to refute, or accept, Mr. Shepherds' explanation as to this issue. Once again, given that Complainant bears the burden of proof on this issue, simply offering unsupported testimony that cannot withstand the most minimal and obvious challenge cannot carry the day for Complainant in its attempt to cast Unitene AGR as containing contaminants such as MEK, and meriting designation as hazardous waste for this reason.

8. Even If Using the Unitenes As Injectants In the WCI Blast Furnace Constitutes Burning for Energy Recovery, the Unitenes Should Be Deemed "Fuels" that Can Be Legally Burned for Energy Recovery Under 40 CFR 261.2.

As both parties and the Court recognize, each litigant is placed in an unusual position with respect to their alternative arguments on the "fuels" issue – namely,

whether the Unitenes can legally be burned for energy recovery if use of the materials in the WCI blast furnace is to be deemed burning for energy recovery by the Court if they are to be viewed as "fuels" themselves. (40 CFR 261.2(c)(2)(ii); see also 5/18/12 Order on Motions for Accelerated Decision, pp. 29-30). If the materials are fuels, they can be legitimately recycled by being burned for energy recovery because burning for energy recovery would be their normal use. (Id.) This issue was extensively addressed in the briefing on Respondents' Joint Motion for Accelerated Decision, as well as Respondents' Brief (pp. 56-58), and will not be repeated here.

However, a few points raised in Complainant's Reply Brief need to be addressed. First, Complainant continues to deny that turpentine, from which all the fact testimony and all of the experts in this case agree that the Unitenes are derived, has been deemed a fuel by U.S. EPA. (Reply, pp. 54-55). At most, Complainant concedes that turpentine was used as a fuel "in one instance." (Reply, p. 55, n. 18). It is indeed unclear as to which "one instance" Complainant refers. [redacted] But, in addition, the record is replete with other instances of turpentines being acknowledged as fuel by U.S. EPA; for example, the "Wasserstrom Letter," which went into great detail about the historical use of turpentine as a fuel. (RX 87). Even Mr. Beedle himself acknowledged the historical use of turpentine as a fuel. (Tr., Vol. IV, pp. 769-770). Similarly, U.S. EPA in various guidance letters regulatory and preambles has discussed how substances that resemble fuels, such as turpentines, even if not off-specification or "benchmark"

fuels themselves, can be deemed fuels and can be burned for energy recovery without running afoul of RCRA. (See RX 87; RX 90-94; 63 Fed. Reg. 33782 (June 19, 1988), "Hazardous Waste Combustors" a/k/a the 'Comparable Fuels' rule (noting that turpentine qualified as a traditional fuel, even if it was not a "benchmark" fuel)). Thus, Complainant's continued attempt to deny these facts is puzzling.

More to the point is the notion that the Unitenes were never used as "fuel" and thus, burning for energy recovery cannot be considered their normal use. The unusual alternative argument situation noted above compels Respondents to agree -- but only to a point. Respondents and IFF have always been clear that the "normal" or contemplated use of Unitene was as a solvent, and as a carbon replacement for coke in the WCI blast furnace. Thus, in one sense, Respondents agree that no one ever intended for Unitene to be "burned" and using it as a "fuel" is not "normal" -- or at least what was intended. Indeed, that measure of proof would be impossible, even under an alternative argument, since the testimony and evidence is consistent that no party involved in the development, marketing, brokerage, purchase and use of Unitene thought of it as a "fuel." But, given the circumstances, one can say that, as a new product that was developed relatively recently, the normal use of Unitene is whatever was contemplated by the parties involved, IFF and CIS, and if the regulatory framework is held to dictate that the use of Unitene in the blast furnace provided "fuel," then Unitene's "normal" use in this context includes use as a "fuel." Complainant's insistence that the "normal" use of Unitene cannot include use as a fuel because no one else used it as such is less than persuasive, given the relatively short lifespan of the product. Indeed, as noted previously, Joseph Leightner, IFF in-house counsel, clearly indicated that IFF had received inquiries from several potential customers regarding use of Unitene as a fuel, and might well have

expanded its market and customer base with such uses, but for this enforcement action. (CX 60, p. EPA 17262).

Complainant's attempt to change the focus of the discussion is clever, but ultimately is no more than a game of semantics. Complainant cannot deny that the key factors that have always concerned U.S. EPA with respect to the uncontrolled burning of hazardous waste fuels are not present here. Complainant has failed to prove the presence of any Appendix VII contaminants in Unitene that would cause air emissions concerns, which has always been the bedrock principle behind U.S. EPA's goal to regulate the burning of hazardous waste-derived fuels. Respondents' expert Dr. Sass clearly testified that the Unitene materials could easily be characterized as fuels, not only due to their high carbon content, but because they were derived from turpentine, which had previously been designated as a fuel by U.S. EPA. (See generally, Tr., Vol. VIII, pp. 1598-1714; RX 130, pp. 13-14).

Indeed, Complainant's previous position that the Unitene materials could have perhaps qualified as a "comparable fuel" is difficult to reconcile with the current notion that it is not a fuel simply because Complainant does not believe that use as a fuel is a "normal" use of Unitene. As explained previous by Respondents, and acknowledged by Mr. Beedle at hearing, a fuel does not have to be a "benchmark" fuel to qualify under the Comparable Fuel Rule on a case-by-case basis (See Tr., Vol. IV, p. 755). Thus, for the purposes of this case, if the Unitene materials are to be deemed to have been "burned for energy recovery," they meet every applicable qualification to be deemed fuels, and therefore qualify for the exception under 40 CFR 261.2(c)(2)(ii).

III. AFFIRMATIVE DEFENSE: FAIR NOTICE DOCTRINE

Complainant attacks Respondents' fair notice doctrine defense first by claiming that "[i]n the present case there has been one consistent interpretation by EPA and the Ohio Environmental Protection Agency." (Reply, p. 64). As discussed at length in II.A., above, Complainant has not even managed a consistent interpretation of what is meant by "burning for energy recovery" for the duration of this proceeding. Its currently espoused view that "burning for energy recovery" now means using a product for its material values in a chemical reaction is merely the newest flavor-of-the-day, an interpretation advanced solely to suit Complainant's enforcement objectives in this case.

Complainant next asserts that the Louisiana Department of Environmental Quality's determination should have no bearing because "a state interpretation of a regulation which is contrary to a federal interpretation . . . should not be the basis upon which it is determined whether or not Respondents had fair notice of EPA's interpretation." (Reply, p. 64). The views of any agency, state or federal, with authority to interpret and enforce a regulation or an identically worded regulation are relevant to the question of fair notice, and when those views are inconsistent, that is an important factor in determining whether there was fair notice. Indeed, in this case, the brokers with whom Respondents were working were directed to Ohio EPA for guidance by U.S. EPA. (Tr., Vol. VII, pp. 1854-1855). Under these circumstances, the guidance that Respondents received from both Louisiana and Ohio EPA are relevant to the fair notice question.

That guidance was very positive. Both Mr. Charpia and Mr. Willis understood Mr. Handrich of the LaDEQ to have articulated the LaDEQ's position that the recycling exclusion applied to the use of injectants in the blast furnace if they supplied carbon content for the metal being produced. (Tr., Vol. VIII, pp. 1793-1795, 1843, 1874). Greg

Orr, the Ohio EPA representative assigned to the General Environmental Management LLC ("GEM") facility in Cleveland, had a similar positive view of the applicability of the exclusion. In 2005, Mr. Orr advised Mr. Lofquist that he was "very much in favor" of the beneficial reuse of various hazardous wastes as carbon feedstocks for the blast furnace pursuant to the recycling exclusion, that he "thought that it made perfect sense," and that he thought that Ohio EPA's central office would concur in that view. (Tr., Vol. VIII, pp. 2003-2005). Mr. Orr even took into account the U.S. EPA discussion regarding Cadence product in its preamble to the final BIF rule, focusing as U.S. EPA did on the issue of the potential for "toxics along for the ride," and was still of the view that the recycling exclusion was applicable. (Tr., Vol VIII, p. 2006). Complainant nonetheless argues that "regulators had deep reservations about respondent's interpretation," but cites to no evidence in the record in support of this statement. (Reply, p. 66).

Complainant attempts to discredit this evidence indirectly by attempting to impeach Mr. Lofquist's testimony.[15] However, Mr. Lofquist's testimony is corroborated both by the documents produced to Complainant by Neville Chemical Corporation, and by the testimony of the third-party witnesses. (See CX 21, CX 22). Complainant also insinuates, once again, that Respondents "may have in fact" been aware of Ohio EPA's determination prior to November 21, 2005. (Reply, p. 65). The inference that U.S. EPA draws from a November 3, 2005, e-mail exchange between Scott Forster and Troy Charpia, however, simply is not supported by the evidence in this case. There is not a single document that shows that Ohio EPA's message of October 28, 2005, to Ernie Willis was provided to Scott Forster or anyone else at CIS or GEM until December 20,

[15] The 2009 General Environmental Management LLC conviction is not based on any false statements authored by Mr. Lofquist and should be given no weight in this regard. (See, CX 49 – CX 53).

2005. At the hearing, Mr. Willis confirmed this (Tr., Vol. VIII, pp. 1859-1860), and Complainant cites to absolutely no evidence to the contrary.

In addition, and inexplicably, Complainant argues that the fact that Respondents contacted regulators to confirm concurrence with their interpretation of the recycling exclusion places them "in an even worse position regarding fair notice, as compared with the respondent in Howmet." (Reply, p. 67). The evidence, however, is uncontroverted that Respondents genuinely believed their interpretation was correct, as did the brokers, their professional consultants, their private environmental lawyers and the generators of the materials that were the subject of the inquiries. (See, e.g., Tr. Vol. VIII, pp. 1782-1783, 1842-1849, 1862, 1941-1942; CX 2, pp. EPA 2723-2726, EPA 2884-2885; CX 7, pp. EPA 6814-6819, EPA 6854-6857). Moreover, the evidence also is uncontroverted that upon being informed of Ohio EPA's determination, although they did not agree that it was correct, they abided by it. After that point in time, although they had the opportunity to do so, Respondents did not knowingly purchase any material known or suspected to be a hazardous waste in reliance on their interpretation of the recycling exclusion. Respondents did exactly what U.S. EPA and Ohio EPA would have wanted them to do. Under these circumstances, unlike in Howmet, Respondents did not "assume a calculated risk" by failing to seek guidance from the appropriate agency and they should be entitled to claim the benefit of the fair notice doctrine.

Finally, although Respondents asserted the defense of fair notice with respect to the single JLM load, believing that they were, in fact, on notice of Ohio EPA's interpretation of the recycling exclusion in December 2005, Complainant has now set a course that raises the fair notice issue with respect to the entire operating life of the facility. Post-hearing, Respondents have been confronted with an entirely new

interpretation advanced by Complainant in reaction to the expert blast furnace testimony that was presented at the hearing, including the testimony of its own expert, Professor Fruehan. Complainant's argument, that all along U.S. EPA intended "burning for energy recovery" to include the use of the enthalpy of materials in chemical reactions, is nowhere expressed in the language of the statute, the regulation, in any prior guidance, or in Ohio EPA's 2005 answer to Mr. Willis. This concept was never raised by Ohio EPA or U.S. EPA in any of their prior communications with Respondents or any of the brokers on the subject. It would be extremely unjust to find that Respondents were on notice of this interpretation at any time prior to the post-hearing briefing that is now underway in this case.

In this case, the fair notice doctrine unquestionably precludes the imposition of civil liability with respect to CIS's receipt of the single test shipment of K022 waste from JLM Chemicals, Inc., prior to Respondents' receipt of Ohio EPA's final determination regarding its interpretation of the "burning for energy recovery" exception to the recycling exclusion. If Complainant's new interpretation of the regulation is adopted, the fair notice doctrine precludes liability arising out of the IFF shipments as well. For this reason, Respondents should be found not liable on some or all of the Counts in the Complaint.

IV. INDIVIDUAL LIABILITY

Complainant continues to grossly overstate its case for individual liability against Eric Lofquist and Scott Forster. Respondents succinctly addressed all of Complainant's misguided allegations of active and pervasive control in their Brief, establishing, by a preponderance of the evidence, that Mr. Lofquist and Mr. Forster cannot be held liable as operators of CIS. However, Complainant continues to cherry pick the "facts" and

misinterpret the documentary evidence in order to convince the Presiding Officer that Mr. Lofquist and Mr. Forster are liable under the factors put forth in In the Matter of Southern Timber Products, Inc., 3 E.A.D. 880, 1992 WL 82626 (E.P.A. Feb. 28, 1992) ("Southern Timber").

Complainant continues to base its argument for individual liability on a flawed view that there is no distinction between CIS and GEM, a distinction Respondents thoroughly developed throughout the hearing and in its briefs on this matter. Respondents are not attempting to shift responsibility by detailing the separate operations of CIS and GEM, as Complainant disparaging alleges. Mr. Lofquist and Mr. Forster readily acknowledge that they are senior executive officers of both CIS and GEM. See CX 3, CX 114. However, being a senior officer of a company does not establish one as an operator of that company without further evidence of active and pervasive control of the operations. See, Southern Timber. GEM was the contracted purchasing agent for CIS since the time CIS was formed in 2004. (Tr., Vol, VIII, p. 1988; CX 2).

Significantly, all of the purchasing activities for CIS performed by Mr. Lofquist and Mr. Forster, and other GEM employees, were done in their capacity as employees of GEM. (Tr., Vol, VIII, pp. 1970-1971; 1988-1993; Tr., Vol. X pp. 2303-2305). The two statements from CIS and GEM's responses to requests for information that Complainant claims establish that GEM and CIS should be viewed as one and the same, in fact serve to further establish the separate nature of the operations of CIS and GEM. When asked about intercompany exchanges of assets and liabilities of the companies, both responses stated there were no exchanges of assets or liabilities, statements Complainant conveniently ignores. CIS and GEM acknowledged that GEM did provide services, such as acting as purchasing agent for CIS, as well as provided employees and labor. The fact

that assets and liabilities were not shared further establishes there was a clear distinction between GEM and CIS, and that the purchasing and regulatory activities Mr. Lofquist and Mr. Forster performed were performed in their capacity as employees of GEM, even though the activities were undertaken on behalf of CIS.

Complainant also points to CIS and GEM's responses to requests for intercompany correspondence between GEM and CIS. Both companies answered that there was no formal procedure for tracking intercompany correspondence but that Mr. Lofquist and Mr. Forster frequently discussed matters affecting both companies. It is to be expected that the responsible corporate officials would discuss matters that affected both companies. This fact does not establish active and pervasive control by Mr. Lofquist and Mr. Forster over the operations of CIS. Rather, it further establishes Mr. Lofquist and Mr. Forster were no more than corporate officers of CIS.

Complainant also questions the distinction between GEM and CIS by alleging the facilities did not have separate offices, liability insurance policies, or separate emails. Complainant is grasping at straws. The record is replete with evidence that CIS and GEM were separate operations. See CX 3, CX 5, CX 114. Complainant's mention of the insurance policy does no more than support Respondents' position that GEM was a contracted service provider for CIS since CIS had no administrative staff.[16] (Tr., Vol, VIII, p. 1988; CX2). In a final attempt to blur the distinction between GEM and CIS, Complainant alludes to CIS and GEM employees having the same email addresses. This is not supported anywhere in the record and is purely conjecture by Complainant. In fact,

16 [redacted]

the record more accurate supports the existence of separate email systems for the two companies. (See Tr., Vol. IX, p. 2277).

None of these facts would be sufficient to pierce the corporate veil of either company. Even Complainant does not suggest this, having made no such claim in this case. These facts also are insufficient to establish that CIS and GEM had anything other than a normal business relationship like any other typical business relationship between customers, suppliers, contractors, and/or service providers. To conclude otherwise would be to completely ignore the entire body of law, including standard UCC law, that exists in this country.

In its Reply Brief, Complainant again draws attention to the loan that Mr. Lofquist and Mr. Forster personally guaranteed. Respondents' agree with Complainant that the wording of the loan document does establish the role Mr. Lofquist and Mr. Forster had at CIS -- that Mr. Lofquist and Mr. Forster were corporate officers of CIS. Nothing in the document establishes that they were operators with pervasive control. The fact that Mr. Lofquist and Mr. Forster personally guaranteed the loans does not mean either individual exercised control of CIS. Employees that operate facilities do not typically personally guarantee loans; officers do. It is a stretch to rely on this loan document to establish active and pervasive control over the operations of CIS.

For the first time in its Reply, Complainant acknowledges the fact that CIS had a plant manager at the facility, Mr. John Dzugan. However, rather than discuss Mr. Dzugan's operational responsibilities at CIS, which were discussed in detail at hearing and which Respondents detailed in their Brief, Complainant ignores all the operational duties performed by Mr. Dzugan. Complainant instead sidesteps the evidence regarding Mr. Dzugan's role at CIS by merely harking back to its insistence that GEM and CIS

should be viewed as one and the same company. This is because the record clearly establishes that Mr. Lofquist and Mr. Forster's purchasing activates were performed in their capacity as employees of GEM, the contracted purchasing agent for CIS and that their involvement in the regulatory discussions was undertaken as part of that sales function and as high level corporate officers at CIS with ultimate responsibility for both companies. These activities simply do not establish their active and pervasive involvement in the overall operations of the remotely-located CIS facility. Mr. Dzugan and the technicians he hired handled the daily operations at CIS.

Lastly, Complainant states that Respondents make "much ado about nothing" by reminding that Complainant had represented that several witnesses would testify as to Mr. Lofquist and Mr. Forster's operation control at CIS, although none did. But in fact, Complainant was unable to produce the evidence it claimed existed to support its contention that Mr. Lofquist and Mr. Forster were actively and pervasively involved in the day-to-day operations at CIS.

Complainant is grasping at straws in its attempt to point to establish that Mr. Lofquist and Mr. Forster are individually liable under the Southern Timber factors. Careful scrutiny of the record shows that Complainant's evidence is not sufficient to satisfy the requirements set forth in Southern Timber for individual operator liability. Complainant's continued mischaracterization of isolated facts, considered in their totality, are insufficient to prove by a preponderance of the evidence that either Mr. Lofquist and Mr. Forster are liable as operators of CIS.

V. PENALTY

Complainant admittedly bears the burden of proof to show that its demanded penalty is appropriate. (Reply, p. 71; see also In re John A. Capozzi d/b/a Capozzi Custom Cabinets, 11 E.A.D. 10, 2003 WL 1787938 (EAB 2003)). It has not met this burden, as illustrated in Respondents' Brief, and as further discussed below.

A. The 2003 RCRA Civil Penalty Policy Need Not (and Should Not, In This Case) Be Applied.

Complainant's penalty demand applies the 2003 RCRA Penalty Policy (the "Policy") to calculate its desired penalty under the various factors stated within the Policy. As explained in Respondent's Brief, Respondents contend that in specific situations such as this one, where application of the Policy cannot provide a fair result, it should not be applied and the Presiding Officer should apply the statutory penalty factors under RCRA to determine an appropriate penalty.

Complainant defends the Policy as "an important tool to be used in the calculation of penalties under RCRA" (Reply, p. 71) and stresses that "many tribunals have relied upon the Policy." (Reply, p. 74). Complainant cites numerous authorities lauding the Policy as a reasoned and consistent approach to penalty calculations under RCRA. (Reply, pp. 71-73). But, there is equal weight of authority that just as strenuously emphasizes that the Presiding Officer has the discretion to make his or her own decision regarding whether the application of the Policy in any particular case would result in an appropriate penalty determination. (Respondents' Brief, pp. 72-73; see also In re Strong Steel Products, LLC, RCRA-5-2001-0016, Initial Decision, p. 153 (April 7, 2005)("[A]lthough the penalty policy provides a framework that allows this Tribunal to apply its discretion to the statutory penalty factors, this Tribunal is not compelled to use a

penalty policy at all in making its penalty determination.")) While Complainant correctly notes that the Consolidated Rules of Practice ("CROP"), 40 CFR Part 22, provide that the Presiding Officer must consider any applicable administrative penalty policies, it is equally true (as set forth in the some of the very same authority cited by Complainant) that the Presiding Officer is free to depart from the Policy as long as he or she explains the basis for such departure.

Complainant misunderstands Respondents' position regarding the appropriateness of the Policy in this case. Respondents do not contend that the Policy is not a useful tool and cannot be appropriately applied in other, more typical enforcement circumstances, to calculate a fair and just penalty. Respondent vigorously contends, however, that under the particular circumstances of this case, application of the Policy cannot yield a fair result, as explained further below. As Respondents have explained, the structure of the Policy provides too rigid a framework (again, in this case) for assessing an appropriate penalty due, among other things, to the lack of flexibility in how the policy weights various criteria such as reductions for good faith and making "multi-day" penalties "mandatory" under the Policy. The circumstances of this case require the Presiding Officer to apply the statutory RCRA factors in such a way as to calculate a fair and just penalty, which the strictures of the Policy do not allow.

B. Applying the RCRA Statutory Penalty Factors, It Is Clear That Complainant's Proposed Penalty is Not Appropriate In This Case.

As noted in Respondent's Brief, section 3008(a)(3) of RCRA provides only two statutory penalty factors:

> In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

42 U.S.C. § 6928(a)(3). Thus, the critical (and indeed the only) factors to be considered under the statutory framework are 1) the seriousness of the violation; and 2) good faith efforts to comply.

1. Seriousness of the Violation - Actual/Potential for Harm to the Environment.

Although no specific criteria are given under RCRA Section 3008 as to what considerations are relevant for evaluating the "seriousness of the violation," Respondents do not disagree that "potential harm" to human health and/or the environment can be a valid measure, just as "actual harm" is also valid. However, it stands to reason that in terms of weighing the two types of harm, instances of actual harm to the environment should be dealt with much more harshly. Potential for harm is, by definition, only a contingency, and is much harder to fairly evaluate, since such harm is conjectural, having not actually occurred.

As freely admitted by Complainant, all of the harm alleged in this case is potential. For example, there was no release of hazardous materials, or failure to properly respond to a release. There is no evidence of any spills, mishandling of materials, exposures from, or even complaints regarding the operation of the CIS facility during the relevant time period; yet Complainant contends these are major/major violations. In comparison to other cases in which a major/major violation was found, actual harm is more often the rule. For example, in Strong Steel, it was explained that "Respondent's failure to respond to continuous and routine releases of hazardous waste, allowing such waste to enter the soils, air and water and to come into contact with human beings and possibly fish and wildlife, directly undermines the bedrock purpose of RCRA

to protect human health and the environment by assuring that hazardous wastes are properly managed." (Id. at 177).

Notwithstanding that there are no allegations, let alone proof, of actual harm relating to a release or other incident concerning hazardous waste at the CIS facility, Respondents do not disagree that potential for harm can be a significant factor in assessing an appropriate penalty. However, the cases relied upon by Complainant for this proposition seek to draw an inappropriate analogy between the 'worst of the worst,' and the case at bar.

For example, Complainant cites In re Euclid of Virginia, Inc., RCRA 3-2002-0303 (Nov. 9, 2006), as a good example of the types of penalties that can be justified when the concern is limited to potential harm, not actual harm. While it is true that the $3,085,293 penalty in that case was based on potential harm, Complainant fails to mention that it was based on multiple violations at multiple facilities, that were clearly in violation of the UST rules, were deemed to have a high probability of causing harm, and were found to be the result of a high degree of negligence on the respondent. (Id.) In contrast, Complainant's claims of potential harm here are much more speculative.

Moreover, Complainant cannot claim that the CIS facility was non-compliant in terms of the typical requirements for used-oil processing facilities. CIS had spill prevention measures (Tr., Vol. IX, pp. 2193-2195), and the personnel were well trained, as was testified to by Mr. Malecki. Although Complainant expresses uncertainty over what information regarding such chemicals was available to the CIS workers (Reply, p. 77), an examination of Mr. Malecki's testimony would have alleviated that confusion:

> Q. Have you ever had an opportunity to review the MSDSs for [Unitene LE and Unitene AGR]?

A. All MSDSs for any material I received at CIS were always sent before the first shipment. They would have been electronically sent to me and then physically at the plant have one on file for any employees other than myself that may need to look at the MSDSs for any given material.

(Tr., Vol. IX, p. 2207). Similarly, Mr. Malecki testified to the types of personal protective equipment used by CIS workers (Tr., Vol. IX, p. 2208). Thus, the issue here is whether any additional potential harm over and above that which could have been caused by a release of the allegedly hazardous waste at issue in this case.

Complainant has disputed many of Respondents' positions on the true potential for harm, such as whether workers, local residents and the nearby Mahoning River could be impacted by a release or exposure to the alleged hazardous wastes at issue in this case. Once again, Complainant largely misses the point, as Respondent's primary contention is that, as a used oil facility, CIS's operations were controlled and supervised, with adequate health and safety procedures, contingency plans, and trained employees. (See RX 71. RX 72, RX 73, Tr. Vol. IX, pp. 2207-2208; Tr. Vol. IX, pp. 2262). Complainant has made no convincing argument or provided any evidence that any of the Unitene materials posed any greater risk of harm than the typical used oil that was regularly handled by the facility. Unitene LE was hazardous, if at all, only because it was ignitable. Complainant completely failed to prove that either Unitene product contained contaminants such as MEK. The JLM material, while hazardous, consisted of only a single shipment. For these reasons, and the reasons set forth in Respondents' Brief, the Court should find minor, if any, potential harm based on CIS's operations.

2. Seriousness of the Violation - Harm to the RCRA Program

The opening relevant paragraph of Respondents' Brief stated:

> The measure of "seriousness" of the violation is a question of the harm or potential harm that actually resulted from the

> RCRA violations, whether such harm is to humans, the environment, or the RCRA program itself. As explained below, Complainant proved no significant harm of any kind at hearing.

(Respondents' Brief, p. 79). Complainant contends that Respondents have totally ignored the issue of "harm to the RCRA program," but as noted above, such is not the case.[17] Rather, Respondents have attacked head-on Complainant's contention that CIS's actions caused harm to the RCRA program by, among other things, illustrating the incongruence between Complainant's claim of egregious harm, and its anemic enforcement posture against IFF. As explained previously, IFF, as the manufacturer and seller of the primary material at issue in this case, and the only party with the proprietary knowledge of its internal manufacturing processes that would have enabled CIS to ascertain the alleged hazardous waste nature of the Unitene materials, is arguably the far more culpable of the two parties. Yet, if addressing harm and deterring future harm to the RCRA program itself is worthy of substantial penalties, as Complainant asserts, its incongruous actions with respect to IFF severely undercut that claim.

Complainant views Respondents' arguments in this vein as relating only to the issue of Respondents' Affirmative Defense of "Selective Enforcement." (Reply, pp. 82-83). In this regard, Complainant cites to In re 99 Cents Only Stores, FIFRA 09-008-0027 (June 24, 2010), for the proposition that its plenary enforcement authority under federal environmental statutes such as FIFRA and RCRA mean that it is essentially accountable to no one, unless it trips over the stringent factors required to maintain a selective enforcement defense. (Reply, pp. 82-83). Complainant further notes that in In re 99

[17] As to the application of the Policy on this issue, it has been recognized that "the Penalty Policy is not overly helpful in interpreting and applying the 'adverse effect' factor, as the Penalty Policy states that: '...*all* regulatory requirements are *fundamental* to the continued integrity of the RCRA program.'" Strong Steel, p. 163, citing Policy (emphasis added).

Cents Only Stores, the respondent argued for a mitigated penalty based on U.S. EPA's failure to pursue the manufacturer of the product (bleach), as well as the respondent retailer. (Id.) Notwithstanding In re 99 Cents Only Stores, Complainant's failure to pursue IFF does not need to rise to the level of an affirmative defense to liability in order to be relevant to penalty. It is directly relevant to Complainant's claim of damage to the RCRA program.[18]

For the purposes of the legal analysis regarding assessment of a fair and just penalty, Respondents do not take issue with Complainant's assertion of its unbridled enforcement authority. Rather, as did the respondent in In re 99 Cents Only Stores, Respondents do take issue with the claimed damage to the RCRA program as claimed by Complainant, in light of Complainant's failure to vigorously pursue IFF with the same zeal it has pursued CIS. While the respondents' argument was largely rejected in In re 99 Cents Only Stores, it is readily distinguished on several grounds.

First, in In re 99 Cents Only Stores, U.S. EPA admitted that the bleach manufacturer, Henkel, was beyond its FIFRA enforcement jurisdiction, Henkel being a foreign corporation. (99 Cents, Initial Decision, p. 45). Second, the EAB found it significant that an indemnity agreement in the purchase agreement provided a means for the respondent retailer to recover some or all of the penalty against the manufacturer, presuming the retailer felt that it had been inequitably forced to pay for the transgressions of the manufacturer. Unlike In re 99 Cents Only Stores, in this case there is no evidence

[18] Even Complainant acknowledges that "RCRA is a strict liability statute, but if Respondents were without sufficient knowledge or ability to properly characterize the material in question and/or were otherwise misled with respect to the nature of the material, that may be relevant to penalty." (Reply, p. 73).

that any indemnity agreement exists between IFF and CIS;[19] indeed, when asked the precise question of who was paying for the defense of this action, Mr. Scott Forster indicated that he and his partner, Eric Lofquist, were, not IFF. (Tr. Vol. VI, pp. 1345-1349).

Most significantly, however, it appears that the respondent in In re 99 Cents Only Stores focused its argument on the liability aspect of U.S. EPA's ability to enforce against the respondent only, or at least the equities of U.S. EPA's failure to pursue the manufacturer as well as respondent. (In re 99 Cents Only Stores, Initial Decision, p. 45) Respondents' argument here is different. Respondents' position is that Complainant's lack of serious enforcement against IFF goes to the merit of Complainant's claim of serious harm to the RCRA program. (Respondents' Brief, pp. 78-79). Complainant cannot on one hand claim serious damage to the RCRA program itself, fail to pursue those most culpable, and reasonably expect to effect deterrence.

Complainant cannot seriously contend that it has vigorously pursued IFF out of concern for the damage to the RCRA program that IFF's actions have allegedly caused. As noted in Respondents' Brief, Complainant has barely pursued IFF, and taken what minimal action it has (i.e., sending an NOV letter (CX59) with no follow-up, enforcement conference, filing of a complaint, etc.) simply because Complainant realized how devastating a complete failure to take any action at all against IFF would be to its claims in the case at bar. Complainant had the second and latest IFF responses to

[19] Complainant does shamelessly suggest that if Respondents believe that they have been unfairly allocated liability, it is their responsibility to pursue through legal action others who they feel are also to blame. (Reply, p. 83). Such might be the accepted framework under CERCLA is joint and several contribution scheme when only one "PRP" among several is targeted by the government, but the civil penalty scheme provided under RCRA is intended to assess a civil penalty only for a respondent specific actions, not for all potential respondents in the aggregate, jointly and severally, leaving such parties to incur the cost of further litigation to equitably distribute the penalty amount among those responsible.

information requests in its hands by March 30, 2010. (CX11) Complainant did not send IFF an NOV until September 12, 2011 (CX59). Almost a year-and-a-half later, Complainant has not even sent IFF Notice of Intent to File Suit for the claims it noted in the 2011 NOV. Complainant resisted every attempt by Respondents to obtain additional information from IFF -- information that Complainant itself should have been interested in (especially as to other Unitene customers) if Complainant was truly concerned about the alleged harm here. (See Complainant's Response to Respondent's Motion for a Revised Case Schedule and Renewed Motion for Third-party Discovery, Filed 12/13/2011.) And, as noted above, if Complainant were truly concerned about the potential harm that could be caused by contaminants such as MEK and ethylbenzene that Complainant maintains are contained in Unitene (which is still being sold to this day), Complainant would long ago have sought means to stop IFF from selling such a harmful product to unsuspecting customers –even those using it as a solvent. Complainant has done nothing of the sort.

Respondents, two white males, face an insurmountable burden to prove an affirmative case of selective enforcement under the law. Nonetheless, it should be clear that Complainant's claim of serious harm to the RCRA program based on Respondents' actions simply does not hold water -- that is, when one fairly compares the zeal and resources committed by Complainant in prosecuting a small company and its principles, in contrast to the indifference with which it has treated the supplier of the alleged hazardous waste, which theoretically has caused, and continues to cause, much greater and widespread harm to the RCRA program with its continuing sales of Unitene to a vast array of customers.

3. Good Faith Efforts to Comply.

As explained in Respondents' Brief, CIS conducted its business activities and handled the two materials at issue here, the JLM material, and the IFF Unitene products, with good faith in all aspects of its activities. [redacted]

However, Complainant has presented no evidence of any "willfulness" or intent to deceive anyone -- generator, regulator or customer. Indeed, the evidence is to the contrary, especially with respect to the regulators.

Complainant vociferously objects to Respondents' statement that Complainant has never suggested that there was anything Respondents could have or should have done differently. (Reply, p. 80). Complainant argues that the entire Complaint outlines exactly what Respondents should have done differently -- that is, obtain permits, conduct training, procure financial assurance, etc. (Id.) Once again, however, Complainant utterly misses Respondents point as it relates to the element of good faith. Respondents' point was that, Complainant never once in this case explained what CIS should have done differently in connection with its purchase of Unitene that would have led it to conclude that Unitene was a hazardous waste, or what CIS should have done differently with respect to how it handled Unitene had it understood that it was a hazardous waste. The only thing that Complainant could come up with was Mr. Beedle's preposterous suggestion that CIS should have been held to a "super precautious" standard with respect to low flash materials such as Unitene LE. In Mr. Beedle's opinion, this should have been cause for further inquiry by CIS as whether it was *possibly* hazardous waste. (Tr., Vol. IV., pp. 943-944). However, many industrial products have low flash points. And as Complainant previously acknowledged, had IFF simply competed some paperwork, U.S. EPA would agree that Unitene LE was a comparable fuel which could and should be

handled exactly in the manner that CIS did handle it, without any additional precautions whatsoever. (See Complainant's Motion for Partial Accelerated Decision, p. 53).

There is no support in the law or the evidence to suggest that CIS should be held to a "super precautious" standard. While Complainant might wish that was the case, and it would certainly make obtaining penalties easier, that is not the law. Mr. Beedle has no evidence that the flashpoint of Unitene LE was anything out of the ordinary for CIS (it was a used oil facility, after all) that should have raised a flag.[20] There is certainly nothing else in all of the documents provided by IFF (MDSDs, bills of lading, certificates of analysis) that would ever have suggested to CIS that it needed to be "superprecautious" regarding purchasing and supplying Unitene LE to the WCI blast furnace. Thus, Respondents' point was that Complainant identified nothing that Respondents reasonably could or should have done differently anticipate on notice that their actions would bring the facility under RCRA regulation. Respondents acted at all times, in good faith, and accordingly, no penalty should be assessed.

C. Multi-Day Penalties are Inappropriate.

As noted above, the fact that "multi-day" penalties are "mandatory" under the Policy is one significant reason why the Policy should not be applied in this case. See Strong Steel, p. 153, n. 188 (Initial Decision). Complainant's penalty calculation includes $1,233,450 for multi-day penalties for Counts 1, 4, 8 and 10. The overwhelming majority of these penalties, $1,181,400, are based on Complainant's assertion that the violations in Counts 1 and 8 were continuing in nature for a period longer than 180 days. Complainant offers no consistent, logical basis for such penalties, however. In its penalty

[20] Mr. Beedle has been deemed wrong before on the issue of when an alleged violator has acted inadvertently in violation of RCRA, rather than "knowingly." Strong Steel, at p. 174.

narrative, [redacted] In its briefing on the cross-motions for accelerated decision, Complainant asserted that the violations would be continuing until the facility completed closure. At the hearing, Mr. Beedle did not explain how or why he believed the violations were continuing, and in its brief, Complainant did not explain how or why it believed the violations were continuing. In its Reply, Complainant again asserted that the violations should be considered continuing until the facility completes closure, but it cited a case for this proposition that, to the contrary, found that the violations continued for the duration of time that RCRA wastes remained at the unpermitted facility, *not* the time until the facility completed closure. In re Mercury Vapor Processing Technologies, Inc., Docket No. RCRA-05-2010-0015 (Dec. 14, 2012). U.S. EPA's position in In re Mercury Vapor Processing Technologies, Inc., which was consistent with its position in In re Everwood Treatment Co., Inc., RCRA (3008) Appeal No. 95-1, Final Order, 6 EAD 589 (1996), is correct and when applied in this case, supports a multi-day penalty component for no more than the length of time the JLM material remained at the CIS facility.

In In re Mercury Vapor Processing Technologies, Inc., "[s]pent lamps were collected from third parties and accumulated at the Riverdale property between February of 2005 and October 30, 2007" and "spent lamps . . . were present at the Riverdale property during the CEI on October 30 [2]007, and during the sampling activities performed by EPA representatives on November 14, 2007." *Id.*, p. 31. At the hearing, U.S. EPA's representative testified that U.S. EPA viewed this as a continuing violation that - - the facility operated beginning at some point in February, 2005, until at least the time of my inspection, October 30, 2007. Though, if I'm correct, if you look at the third

information request response to - - for Mercury Vapor Processing technologies, it wasn't until some point in time in 2008 when the lamps that were - - were finally removed from the Riverdale facility for good. *Id.*, p. 77. U.S. EPA then calculated its multi-day penalty based on its determination of how long the spent lamps had remained at the facility. U.S. EPA also sought a compliance order that required facility closure, but U.S. EPA never argued that the RCRA violations were continuing until such closure was completed. See also, In re Industrial Marine Purification Systems, Inc., Docket No. RCRA 09-93-001, 1993 WL 302378 (E.P.A. June. 21, 1993)(Multi-day penalties were based on the total number of days material was actually stored on site, not the length of time the facility was in operation.); In re Everwood Treatment Co., Inc., RCRA (3008) Appeal No. 95-1, Final Order, 6 EAD 589 (1996)(Multi-day penalty was imposed for no longer than the duration that hazardous waste remained improperly stored without a permit at the site, which was from June 1990 when the spill occurred, to February 1991 when the buried storage area was uncovered); In re M.A. Bruder & Sons, Inc., RCRA (3008) Appeal No. 01-04, Final Decision, 10 EAD 598 (1992)(EAB rejected U.S. EPA's multi-day penalty theory which was based on the length of time the facility was in operation without a permit, rather than the length of time of the actual RCRA violation.).

Here, Complainant introduced no evidence to show how long the single shipment of JLM material was present at the CIS facility. The only evidence was the testimony of CIS employee who recalled that, at most, CIS temporarily stored the single shipment from JLM for "less than 12 hours." (Tr., Vol. IX, p. 2203). This testimony was uncontroverted. Accordingly, Complainant's demand for the imposition of $1,181,400 in multi-day penalties should be rejected.

D. There Is No Environmental Compliance History That Justifies An Upward Adjustment Of Any Penalty.

Complainant's penalty calculation includes an across-the-board five percent upward adjustment for "history of non-compliance." In its brief, Complainant merely affirms, without any explanation, that its penalty calculation includes an upward adjustment of five percent for "history of non-compliance," citing only to its penalty narrative and to its penalty policy. Complainant does not cite to the testimony of Mr. Beedle, who performed the penalty calculations, because his testimony does not, in fact, support this component of the proposed penalty. Mr. Beedle's testimony was extremely limited. He claimed to have relied "in part" on CX 49, the only document that he identified in connection with the five percent upward adjustment, and did not mention any other prior compliance history. (Tr., Vol. III, p. 519). Over Respondent's objections, and without any attempt at authentication or foundation being made, Complainant's exhibits CX 50 through CX 53, CX 97 through CX 103, and CX 105 through CX 111 were admitted into evidence,[21] but nowhere in the record is there any evidence that these exhibits were relied upon in support of Mr. Beedle's proposed upward adjustment. (Tr., Vol. III, pp. 519-522).

In its reply brief, however, U.S. EPA asserts that an across the board five percent upward adjustment is appropriate in order to "provide real punishment and deterrence to Respondents." U.S. EPA claims that Respondents "were not deterred by the combined fine of $20,000 in the Forster/GEM criminal matter." (Reply Brief, p. 89). Complainant's rationale regarding deterrence is, apparently, based on its penalty policy which as follows:

[21] The basis for the admission of these exhibits is not apparent from the record, the Hearing Officer having previously declined to take judicial notice of them, and Complainant having offered no foundation for their admission (see, Tr., Vol. III, pp. 519-522).

> Where a *party* previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the *party* was not deterred by the previous enforcement response. Unless the current or *previous violation was caused by factors entirely out of the control of the violator*, this is an indication that the penalty should be adjusted upward. . . . A violation should be considered "similar" if the Agency's or State's previous enforcement response should have alerted the party to a *particular type* of compliance problem. . . . Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a *pattern* of disregard of environmental requirements contained in RCRA or another statute.

(U.S. EPA's June 2003 RCRA Civil Penalty Policy, p. 37)(emphasis added). Complainant's reliance on its evidence of Respondents' "history of non-compliance" as support for the notion that Respondents were "not deterred by the previous enforcement response" is completely without merit, however, and it cannot justify the upward adjustment the Complainant seeks to impose.

First, it is axiomatic that in order for an enforcement response to deter conduct, the enforcement response must have taken place *previously*, before the conduct in question. Here, Complainant alleges that Respondents violated RCRA when they opted to purchase JLM's K022 waste in 2005, and IFF's two Unitene products beginning in 2006. The $20,000 fine that Complainant now argues should have served to deter such conduct was levied in 2009 in an enforcement action that was brought in October 2008. It is simply absurd to suggest that in 2005 and 2006 Respondents should have been, but were not, deterred by the imposition of the 2009 fine. See, In the Matter of Indspec Chemical Corporation and Associated Thermal Services, Inc., 1999 WL 118178 (E.P.A. Jan. 26, 1999)(five exhibits alleged to address compliance history would not be considered for the penalty calculation as the events in the notices occurred *after* the date of violation at issue). Much of Complainant's evidence of "prior" history of non-

compliance suffers from this same defect in timing, including CX 107, CX 108, CX 109, CX 110 and CX 111.

It cannot credibly be argued that the remainder of Complainant's evidence of so-called prior history of non-compliance furthers U.S. EPA's goal of deterrence for a variety of other reasons. The nature of the alleged violation in some instances is too unrelated to have any bearing on the particular RCRA violations at issue here (see, e.g. CX 99, CX 100, CX 111). Others were justifiably denied by Respondents and eventually dismissed or withdrawn with no finding that a violation in fact occurred (see, e.g., CX 99, CX 100, RX 14). And some were unquestionably due to events beyond Respondents' control (see, e.g., CX 101, CX 102, CX 103, CX 106). In fact, taken as a whole, the evidence relating to Respondents' environmental compliance shows that for the most part, the various incidents that comprise the Respondents' compliance history were relatively minor in nature, were taken seriously by Respondents, were already corrected or were promptly corrected upon discovery, and were never repeated (see, e.g., CX 97, CX 98, CX 105, CX 106, CX 109, CX 110). None reveal any impact to the environment, and none reveal any failure to cooperate fully with the agencies at any time. Far from establishing a pattern of disregard for environmental regulation, the evidence reveals Respondents' diligent responses to occasional isolated instances of non-compliance discovered during routine annual inspections.

In any event, Complainant's stated goals of punishment and deterrence are not served in this case by the proposed upward adjustment because the alleged violations in this case are due to a dispute over the meaning and application of U.S. EPA's recycling exclusion and in particular, the meaning of the phrase "burning for energy recovery." Nor is Respondents' knowledge that the regulation existed an issue. Respondents were

aware of the regulation, considered it very carefully, and concluded then, as they conclude now, that they properly interpreted the regulation and did not violate it. Indeed, as the Presiding Officer noted when denying the parties' cross motions for accelerated decision, "this inquiry involves a complicated application of the different regulatory provisions, many of which the parties dispute. For the reasons set forth below, I find these disputes raise genuine issues of material fact that must be addressed at hearing." (May 18, 2012, Order on Motions for Accelerated Decision, pp. 27-28). If it is determined in this case that Respondents were wrong in their interpretation, it would not be because they disregarded the regulation or were undeterred by prior instances of violations of *other* regulations. In these circumstances, no upward adjustment of penalty on the basis of compliance history can be justified.

E. Respondents' Proposed Penalty is Reasonable and Appropriate.

Respondents contend that no penalty should be assessed, but in the event that the Court finds some penalty is appropriate, Respondents propose that only a nominal penalty is appropriate. The Policy is not flexible enough to provide for appropriately small penalties in such cases, which is another reason why using the Policy would give an unjust result.

Conversely, Complainant contends that Respondents' proposed penalty is too small to be a sufficient deterrent, and that Respondents have 'pulled numbers out of the air.' (Reply, 87-88). First, as explained above, Complainant has fallen short of proving that there was significant knowing activity to deter. Especially with regard to Unitene, Complainant's abject failure to explain what CIS did wrong with respect to purchasing and handling that material strongly suggests that there was no conduct worthy of deterrence. As to the issue of an 'arbitrary' penalty figure, Complainant's penalty

calculation should be accorded no special treatment simply because it is complicated. Well-formatted injustice is still injustice, and the Policy should not be used itself as a justification for high penalties.

As to Mr. Beedle's BEN penalty calculation, Respondents' position, as explained in Respondents' Brief, is that Mr. Beedle's economic penalty calculations failed to meet even a minimum standard for reliability. (Respondents' Brief, pp. 88-89). Respondents should not be required to audit U.S. EPA's penalty calculation and disprove its accuracy, when it is plain that Respondents have already proved that Mr. Beedle failed meet a minimum level of competence as a so-called expert to provide an error-free and credible opinion.

VI. CONCLUSION

For all of the foregoing reasons, Respondents should be found not liable for the alleged RCRA violations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that the foregoing Respondents' Joint Post-hearing Sur-reply Brief was sent on January 25, 2013, in the manner indicated, to the following:

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