

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of: )

Carbon Injection Systems LLC, )  
Scott Forster, )  
and Eric Lofquist, )

Docket No. RCRA-05-2011-0009

Respondents. )  
\_\_\_\_\_ )

COMPLAINANT'S REPLY TO  
RESPONDENTS' MEMORANDUM IN OPPOSITION TO  
COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

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**I. Introduction**

Respondents have expended considerable effort to complicate a relatively simple matter. That is, the Respondents treated and stored<sup>1</sup> hazardous waste at the CIS facility without applying for or obtaining a RCRA permit and without complying with various other RCRA requirements.

Respondents admit that they did not apply for or obtain a RCRA permit for the CIS facility and that they did not comply with various other RCRA requirements. Respondents attempt to argue that the wastes CIS accepted were not hazardous because they were not solid waste – for several convoluted reasons.<sup>2</sup> However, the record shows that the material treated and stored by Respondents was a solid waste because it was a “discarded material”, and it was a “discarded material” because it was recycled by being burned for energy recovery. The record demonstrates that the material falls within Table

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<sup>1</sup> Respondents have argued that they did not treat the waste, which EPA has shown that is incorrect. Complainant’s Motion for Partial Accelerated Decision as to Liability (“Complainant’s Motion”). In any event, Respondents admit that they stored the waste. Respondents’ Response at p.3, n.1.

<sup>2</sup> Respondents have argued that the IFF material does not fall within Table 1 of OAC § 3745-51-02(C)(2)(a)[40 C.F.R. § 261.2(c)(2)(i)] because it is a co-product which was not burned for energy recovery but rather was used or reused as an ingredient or used or reused as an effective substitute for a commercial product. OAC § 3745-51-02(E)[40 C.F.R. § 261.2(e)] EPA has shown why these arguments are unsuccessful in Complainant’s Motion and Complainant’s Response.

1 of OAC § 3745-51-02(C)(2)(a)[40 C.F.R. § 261.2(c)(2)(i)], and that the wastes were not themselves fuels under OAC § 3745-51-02(C)(2)(b) [40 C.F.R. § 261.2(c)(2)(ii)].

Furthermore, the evidence is clear that Respondents Forster and Lofquist have direct operator liability in this case. In addition, Respondents have been unable to prove any affirmative defenses.

In Respondents' Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision as to Liability ("Respondents' Response"), Respondents attack EPA's showing that: (1) the IFF wastes are by-products or commercial chemical products; (2) the IFF and JLM wastes are burned for energy recovery; (3) the IFF and JLM wastes are not commercial chemical products which are themselves fuels; and (4) Respondents Forster and Lofquist are directly liable as operators of the CIS facility. Respondents also bring a new twist to their old affirmative defense argument concerning fair notice. As demonstrated below, the arguments in Respondents' Response fall short of their intended marks. Instead, the record establishes that there is no genuine issue as to any material fact and Complainant is entitled to judgment as a matter of law.

## **II. Discussion**

### **A. The CIS Facility Did Treat Hazardous Waste**

As noted in the Complaint and in Complainant's Motion for Partial Accelerated Decision as to Liability ("Complainant's Motion"), Respondents' storage and treatment of hazardous waste at the CIS facility without a permit violated Section 3005 of RCRA, 42 U.S.C. § 6925(a) and the requirements of OAC §§ 3745-50-40 to 3745-50-66 [40 C.F.R. §§ 270.1(c) and 270.10(a) and (d), and 270.13]. In particular, Section V.A.3.b of Complainant's Motion explains how the CIS facility treated and stored hazardous waste.

The Respondents' Response addresses treatment specifically,<sup>3</sup> arguing that EPA is mistaken in its assertion that hazardous wastes were treated at the CIS facility by blending them to meet fuel specifications. Respondents argue that the CIS facility was not used for fuel blending, and instead was a transfer facility. Respondents also argue that EPA's interpretation of "treatment" under RCRA implies that treatment did not occur at the CIS facility. Respondents are wrong.

The evidence establishes that the CIS facility was used for blending hazardous waste with used oil. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As a facility that blended material in order to be burned for energy recovery, CIS is clearly regulated. According to EPA guidance:

Some fuel blenders have asserted that, since their activities are considered recycling, the blending operation is exempt from permit requirements according to §261.6(c)(1). Section 261.6(a)(2), however, clearly states that hazardous wastes which are recycled materials and are burned for energy recovery "...are regulated under Subparts C through H of Part 266 of this chapter and all applicable provisions in Parts 270 and 124 of this chapter." This provision makes it clear that fuel blending is not exempt from regulatory standards or permitting.

CX95 at EPA18547.

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<sup>3</sup> Respondents do not dispute that storage occurred at the CIS facility. Respondents' Response at p. 3, n.1.

Respondents argue that this guidance is not applicable to the CIS facility based on the notion that the CIS facility is a transfer facility rather than the location of fuel blending activities and based on their reading of several letters from EPA to other members of the regulated community. RCRA regulations define “transfer facilities” as:

“Transfer facility” means any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous waste are held during the normal course of transportation.

OAC § 3745-50-10(A)(120)[40 C.F.R. § 260.10]. The CIS facility simply was not a transfer facility. Respondents have never characterized it as a shipment or transportation facility and can turn to no evidence to support their contention because there is none. At the CIS facility, treatment and storage occurred. This treatment and storage was not part of the transportation of hazardous wastes. Hazardous waste was transferred to the facility for the treatment and storage (hence the need for truck unloading stations), but the purpose of the CIS facility was not to transport materials.

Turning to Respondents’ interpretation of several EPA letter, the first such letter is dated September 19, 1985, and is from Williams (EPA) to Manthey (G W Inc.). In this letter, EPA addressed several situations involving the bulking and consolidation of compatible hazardous wastes with different EPA waste codes. The letter cites as examples where a transporter: (1) picks up waste from several generators in order to send full loads to RCRA treatment, storage and/or disposal (“TSD”) facilities; (2) consolidates different bulk waste shipments in a tank truck; or (3) pumps the contents or drums containing different EPA waste codes into a single tank truck. This letter is not applicable to the CIS facility because the CIS facility is not a transporter – rather, the CIS facility is a TSD facility. Mixing listed hazardous wastes in a tank truck for purposes of

transport is quite different than mixing hazardous waste with used oil at a TSD facility for purposes of creating a hazardous waste fuel blend to be sold to a blast furnace for burning. The conclusion in the letter is not applicable to the CIS facility. The second letter is dated March 1, 1990, and is from Lowrance (EPA) to Jaekels (GSX Government Services, Inc.). In this letter, EPA distinguished between bulking characteristic hazardous waste shipments to achieve efficient transportation (which may not meet the definition of "treatment" and may not require a RCRA permit) and bulking and containerizing hazardous wastes which are intended to be burned for energy recovery (which *is* subject to RCRA jurisdiction and does require a RCRA permit. The activity occurring at the CIS facility was simply not transportation-related activity. It was very clearly blending, which constitutes treatment. This second letter does not aid Respondents in their argument either. The third letter is dated December 5, 1994 and is from Shapiro (EPA) to Benoit (Cement Kiln Recycling Coalition). In this letter, EPA was responding to a concern that certain language in a recent EPA guidance document was arguably too narrow, and may result in the restriction of deconsolidation of wastes at transfer facilities. EPA agreed that "[a]ctivities such as containerizing, consolidating, and de-consolidating are within the scope of acceptable transfer operation activities, assuming of course no blending is taking place." Again, the CIS facility was not a transfer facility. It was a blending facility. This letter also does not aid Respondents' argument. The fourth letter is dated October 12, 1995, and is from Shapiro (EPA) to Kuhn (Laidlaw Environmental Services, Inc.). This letter addresses two scenarios. One is the consolidation of compatible bulk or containerized hazardous waste into a tank or container for the purpose of efficient transportation or disposal. EPA concluded that this

would not be “treatment” so long as “fuel blending” was not occurring. The other is where hazardous waste fuel is blended with the intention of meeting a specification. EPA concluded that this would be “treatment”. The activities at CIS clearly fall under the second fact pattern and are properly considered “treatment”. Nothing in the record suggests that the CIS facility placed the hazardous waste in the tanks for purposes of the efficient transportation of those hazardous wastes or for the disposal of those hazardous wastes. This fourth letter likewise does not aid Respondents’ argument.

Respondents also argue [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A complete discussion

of this practice appears below, at Section B.3.

In short, the CIS facility was used for treatment, and Respondents have not shown otherwise.

**B. The Unitene Materials that Respondents Purchased from IFF Were Wastes**

Respondents have discovered themselves in the position where their arguments concerning Unitene’s regulatory status as a co-product are supported by neither fact nor law. Being so situated, Respondents resort to ignoring the volumes of information concerning the generation and handling of Unitene that was submitted by IFF in response to EPA information requests. Remarkably, although IFF submitted over 3000 relevant pages to EPA, *see* CX9 and CX11, Respondents completely ignore those submissions in their Respondents’ Motion for Accelerated Decision and in Respondents’ Response. Instead, of relying on the uncolored facts contained in IFF’s original responses,

Respondents look to the recent depositions of four IFF employees - individuals who work for a company that is now potentially facing enforcement based on the exact same jurisdictional issue - to support their case. *See* CX59 (a Notice of Violation sent from EPA to IFF which alleges that Unitene is a hazardous waste). Where they find the new deposition testimony lacking, Respondents conjure new facts and obfuscate relevant issues, because IFF employees were unable to provide Respondents with any detailed facts to demonstrate that Unitene was a co-product.

To clear the air, it is necessary to simply and clearly restate the issue presently before this Court. Pursuant to OAC § 3745-51-02(F), Respondents, bear the burden of demonstrating that Unitene is not a waste. Under the facts of this case, this requires Respondents to prove that Unitene is not a by-product burned for energy recovery. In order to prove that Unitene is not a by-product, Respondents must demonstrate that: (1) Unitene is not “generally of a residual character”; (2) Unitene was “produced intentionally and separately”; and (3) Unitene is fit for end use without substantial processing. *See* Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. at 614, 625 (Jan. 4, 1985). Although they are hidden among irrelevant arguments, Respondents do address these factors in Respondents’ Response. After stripping away Respondents’ diversions, it is clear that Respondents cannot satisfy these factors and cannot demonstrate that Unitene is not a waste, as OAC § 3745-51-02(F) requires.

1. **Unitene Is “Generally of a Residual Character”**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Unitene Is Not Produced Intentionally or Separately

The second factor in determining whether a material is a by-product or co-product is whether that material is produced intentionally or separately. Definition of Hazardous Waste, 50 Fed. Reg. at 625. [REDACTED]

[REDACTED]

a. IFF's Historical Disposal of Unitene

[REDACTED]

<sup>4</sup> EPA explains [REDACTED]

<sup>5</sup> [REDACTED]

[REDACTED]

[REDACTED]

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6 [REDACTED]

[REDACTED]

b. IFF's Disposal of Unitene After It Was Named and Sold to CIS

[REDACTED]

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<sup>7</sup> While Respondents' make no attempt to apply it to any of the relevant factors, they note that IFF owns a trademark for the name, "Unitene". Like their other arguments, this is irrelevant to the factors at issue. The trademark protects only the material's *name*; The fact that IFF obtained a trademark for the word "Unitene" signifies an intention to protect the name "Unitene". Trademarking a name does not demonstrate that the named material is a patentable invention or product. If Unitene was an invention or product that IFF intended to product and protect, then IFF would have obtained a patent to protect its invention and exclude others from selling the same material. No evidence suggests that



[REDACTED]

4. **Respondents' Remaining Arguments Are Befuddling and Meritless**

Based on the foregoing analysis, applying established facts to the factors relevant in defining a by-product, the only conclusion is that [REDACTED]

[REDACTED]

[REDACTED] Accordingly, Unitene can only be a "by-product". Respondents' remaining arguments concerning by-products do not relate to the relevant factors and merely attempt to obfuscate the issues. Specifically, (a) Respondents' disagreement with Mr. Clark's opinion is baseless; and (b) the generation of Unitene is not analogous to the production of useful products through crude oil distillation. Through these distracting arguments, Respondents are not able to satisfy their burden under OAC § 3745-51-02(F), and Respondents present no genuine issue of material fact that would prevent this Court from granting EPA's Motion.

a. Respondents' Disagreement with Mr. Clark's Opinion Is Baseless

Respondents argue that Mr. Clark's opinion is based on both a logical fallacy and a scientific fallacy. Respondents' Response pp. 15-16. [REDACTED]

[REDACTED]

Next, Respondents contend that Mr. Clark's opinion is flawed by a scientific perspective. Specifically, Respondents complain that Mr. Clark [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b. **The Generation of Unitene Is Not Analogous to the Production of Useful Products Through Crude Oil Distillation**

Respondents contend that the generation of Unitene is analogous to the production of useful products through crude oil distillation. Respondents' Response at pp. 18-20. However, the distillation of crude oil is very different from the distillation that generates Unitene. Crude oil distillation columns are designed to produce, upon their initial installation, several intended products that will be sold to established markets. Clark Supp Decl. at ¶ 7. Petroleum distillation columns are large and technologically advanced, containing potentially dozens of thermodynamically unique layers required to separate specific products from the column's feed stream. *Id.* Because the products of crude oil distillation columns are intentionally produced and can be used without substantial processing, they are not by-products. In contrast, [REDACTED]

[REDACTED]

[REDACTED]

Respondents also create a hypothetical in an attempt to liken crude oil distillation to the generation of Unitene. The hypothetical [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Therefore, Respondents' hypothetical is unpersuasive.

**C. The Injectants Sold by Respondents to WCI Steel Were Combusted or "Burned" in WCI Steel's Blast Furnace for the Purpose of "Energy Recovery"**

The hazardous waste blend that Respondents sold to WCI Steel was combusted or "burned" by WCI Steel for the purpose of "energy recovery" under OAC § 3745-51-02(C)(2) [40 C.F.R. § 261.2(c)(2)] as well as OAC § 3745-51-02(E)(2)(ii) [40 C.F.R. § 261.2(e)(2)(ii)] and, thus, not exempt from the definitions of "waste" provided for "recycled materials" under OAC § 3745-51-02(E)(1) [40 C.F.R. § 261.2(e)(1)]. This is true based on an application of the facts to the regulations as construed by U.S. EPA in the preamble to the final rules. Unhappy with this result Respondents, in the words of

Cher, would “turn back time” to “find a way [to] take back those words that hurt”<sup>8</sup> in the regulations and in the Federal Register preamble that accompanied the final definition of “solid waste.” So, Respondents urge the Court both to reject science *and* to adopt a regulatory interpretation suggested in the preamble to the proposed regulations that was expressly rejected when the final definition was adopted.

Respondents’ Response explained that a material is a “recycled material” (and thus not a “waste”) if it is “[u]sed or reused as ingredients in an industrial process to make a product. . .” or is “[u]sed or reused as effective substitutes for commercial products.” OAC § 3745-51-02(E)(1) [40 C.F.R. § 261.2(e)(1)]. A material is a waste, however, if it is “recycled” by being “burned for energy recovery, used to produce a fuel, or contained in fuels.” OAC § 3745-51-02(C)(2) [40 C.F.R. § 261.2(c)(2)]; OAC § 3745-51-02(E)(2) [40 C.F.R. § 261.2(e)(2)]. Here, Respondents’ hazardous waste blend was sold to WCI Steel, which burned the hazardous waste blend in its iron-making blast furnace for “energy recovery” within the meaning of OAC § 3745-51-02(C)(2) [40 C.F.R. § 261.2(c)(2)] as well as OAC § 3745-51-02(E)(2) [40 C.F.R. § 261.2(e)(2)]. Complainant’s Motion at pp. 37-46; Complainant’s Response at pp. 25-35. The recovered energy takes two forms: the combustion of the hydrocarbons in the hazardous waste blend creates heat energy, which replaces the heat energy of displaced coke; and the combustion of the hydrocarbons in the hazardous waste blend also provides chemical energy in the form of reducing gases, which are necessary for the chemical reactions that convert iron oxide into iron. Complainant’s Response at pp. 26; 29-31. Thus, Respondents’ hazardous waste blend was a “waste,” because it was “recycled” by being

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<sup>8</sup> “If I Could Turn Back Time,” written by Diane Warren and sung by Cher.

“burned for energy recovery.” Conversely, Respondents’ hazardous waste blend was not “[u]sed or reused as ingredients in an industrial process to make a product. . .” or “[u]sed or reused as effective substitutes for commercial products,” within the meaning of 40 C.F.R. § 261.2(e)(1) and OAC § 3745-51-02(E)(1), to make iron. Neither the carbon in the oil, nor the reducing gases (CO and H<sub>2</sub>) created by the combustion of hydrocarbons, enters the iron.<sup>9</sup> Complainant’s Response at pp. 26; 32-33. Thus, Respondents’ hazardous waste blend was not excluded from the definition of “waste” by being “recycled” for “material recovery.”

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<sup>9</sup> Respondents’ expert, Mr. Rorick, asserts that “[t]he total energy balance of the furnace shows that energy from the carbon is either chemically bound to the hot metal (70%), or is simply lost, not recovered, to top gases, hot slag, and the furnace walls.” Respondents’ Motion for Accelerated Decision at p. 50 (citing “Technical Report on Blast Furnace Issues in the Matter of Carbon Injection Systems LLC, et al. Docket No. RCRA-05-2011-09” written by Frederick C. Rorick (“Rorick”) at p. 12). The assertion that “energy” from the carbon is “chemically bound to the hot metal” can charitably be characterized as misleading. In this regard, Dr. Fruehan states:

The oil injected at the tuyere level cannot serve as a source of carbon incorporated into the iron in the iron making process, because it is combusted almost instantly upon injection at the tuyere level. Similarly, the reducing gases CO and H<sub>2</sub> function in the furnace reactions only, and are not ingredients that are added to the iron. In this regard, I disagree with Mr. Rorick’s statement that “70% of the energy supplied by the coke and hydrocarbon is converted into energy that is chemically bonded to the hot metal.” Rorick at 3. The idea that in the iron making process energy is “chemically bonded” to the hot metal (Rorick at 3, 13, 14) is not consistent with fundamental thermodynamics.

Supp. Decl. Fruehan at ¶ 21.

Respondents attempt to rebut the conclusion that their hazardous waste and used oil blend was combusted for energy recovery through their “scientific” perspective. Specifically, Respondents request this Court to adopt the idea that their used oil and hazardous waste blend is an “ingredient” in iron-making, because the carbon from the hazardous waste actually enters the final iron product. In asserting this, Respondents’ experts rely on the conclusions of a report prepared to assist Europe’s steel industry in avoiding the European Union’s carbon tax. *See* Complainant’s Response at pp. 33-35. Respondents also “pull a fast one” by misstating one of the conclusions of U.S. EPA’s expert, Dr. Fruehan.

First, as explained in Complainant’s Response, the conclusion of Jeschar and Dombrowski (in their “Summary Evaluation and Assessment of Carbon and Hydrocarbon Raw Materials for Iron Reduction”) that carbon and hydrocarbons carriers should be classed as chemical raw materials was reached with a specific agenda in mind (to protect the steel industry in the European Union from carbon taxes that would raise the costs of production and thus make their steel uncompetitive with steel produced elsewhere). Complainant’s Response at pp. 33-35. This makes their conclusion of questionable worth.

Second, Respondents misleadingly paraphrase one of Dr. Fruehan’s conclusions and fail to differentiate among the kinds of carbon sources that can be injected at the tuyere level of a blast furnace to support their conclusion that carbon and hydrocarbons carriers should be classed as chemical raw materials (and thus “ingredients” that are not a “waste”). In the words of Respondents:

According to Dr. Fruehan, injectants are immediately combusted in the raceway of the furnace, thereby supply heat energy to the process, and do

not contribute to the carbon in the molten iron and thus are not an ingredient. Respondents' experts, Dr. Joseph J. Poveromo and Frederick Rorick, disagree, and suggest that Dr. Fruehan's testimony and opinions are based on outdated information that industry now knows to be inaccurate.

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As a result of Dr. Fruehan's belief that "immediate combustion" of the injectants in the raceway takes place, Dr. Fruehan concludes that the injectants are not the source of any of the carbon in the molten metal.

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[O]nly a small fraction of the injectants are immediately consumed in the raceway, with the majority of the material available for chemical reaction elsewhere inside the blast furnace . . . . The iron that is produced in the blast furnace contains four to five percent carbon by weight . . . . Dr. Fruehan does not believe that the carbon in the injectants ever escape the raceway. However, in fact approximately 70% of the carbon in the injectants reacts outside the raceway and is as equally available as the carbon in the descending coke as the source of carbon in the molten metal.

Respondents' Response at pp. 30-31; 31-32. Significantly, Dr. Fruehan's statements regarding the combustion of injectants and their availability as a carbon source differentiated among the kinds of injectants used. Thus, Dr. Fruehan limited his explanation to the injectant being oil:

[T]he oil injected at the tuyere level serves the purpose of being the fuel<sup>[10]</sup> that provides the heat to raise hot blast temperatures to optimum

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10

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



disagree with Mr. Rorick's statement that "70% of the energy supplied by the coke and hydrocarbon is converted into energy that is chemically bonded to the hot metal." Rorick at 3. The idea that in the iron making process energy is "chemically bonded" to the hot metal (Rorick at 3, 13, 14) is not consistent with fundamental thermodynamics.

Fruehan Supp. Decl. at ¶ 21. U.S. EPA's agrees that where the injectant at the tuyere level is, for example, pulverized coal, not all of that pulverized coal is immediately combusted and some of its carbon is available as a source of carbon in the iron. U.S. EPA, however, does not agree that any carbon from the burning of oil injectants enters the iron.

Interestingly, with respect to Respondents' argument that injectants are a source of carbon found in iron, Mr. Rorick's own Report seems to debunk that idea. First, the Report references only "energy" being "bonded" to iron (a notion rejected by Dr. Fruehan) and does not at all discuss carbon from the injectants being added to iron. Second, the Report includes a mass balance diagram prepared by Jeschar and Dombrowski that shows absolutely no carbon ascending the blast furnace column from the tuyere level. Rorick Report at p. 11, Figure 5. Instead, the only carbon shown on this mass balance diagram is carbon, derived from the coke, descending from the top of the blast furnace column. This supports the conclusion that carbon and hydrocarbons injected at the tuyere level are completely combusted and that no carbon from the injectants remains available for the molten iron.

As the foregoing explains, Respondents have attempted to insert an issue of material fact (whether their liquid hazardous waste is an ingredient, or provides an ingredient, in iron) into this matter where there is none present. Simply, Respondents' the hazardous waste blend is neither itself an ingredient, nor provides any ingredients, in

iron. Regardless of whether the carbon from the injected material actually enters the final iron product, the record establishes that Respondents' hazardous waste blend is a regulated waste, because it was burned for energy recovery under OAC § 3745-51-02(C)(2). Respondents agree that the injectants provide energy to the blast furnace. This is most apparent when Respondents explain that "[t]he formation of CO is exothermic and produces significant energy . . . ." Respondents Response at p. 50. As explained in the preamble to the definition of solid waste, when an injectant provides materials as well as energy when burned, it remains regulated as a waste.

[M]uch of the Agency's on-going activity addresses burning of hazardous wastes for energy recovery in boilers or industrial furnaces, and explained our definitions of these terms, as well as our definition of incinerator. We discuss here which secondary materials are wastes when burned as fuels, and how to distinguish among burning for energy recovery, burning for material recovery, and burning for destruction, as well as the regulatory implications of falling into each of these three categories. We also discuss our future regulatory plans, and finally address how we are regulating storage that occurs before burning hazardous waste for energy recovery.

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[I]ndustrial furnaces are used as integral components of manufacturing processes to recover materials. Thus, regulation under RCRA of actual burning in industrial furnaces could, in some circumstances, represent an intrusion into a normal production process, particularly if the material being recovered is the same as the material the furnace ordinarily produces. On the other hand, when 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. [...]

*When industrial furnaces burn for energy recovery, regulation of the burning would not constitute an impermissible intrusion into the production process because burning for energy recovery is an activity that is not central to the usual function of an industrial furnace. See H.R. Rep.*

98-198 at 40 (industrial furnaces burning for energy recovery are to be regulated under the waste-as-fuel provisions of H.R. 2867). *We therefore are asserting RCRA jurisdiction when an industrial furnace burns hazardous secondary materials— i.e., hazardous wastes—for energy recovery.*

*The regulations would also apply when an industrial furnace burns the same secondary material for both energy and material recovery. Examples are blast furnaces that burn organic wastes to recover both energy and carbon values, or cement kilns that burn chlorinated wastes as a source of energy and chlorine. (Indeed, energy recovery from burning in kilns is automatic, so that all burning of hazardous wastes in kilns is within the Agency's RCRA jurisdiction.) These activities are not so integrally tied to the production nature of the furnace as to raise questions about the Agency's jurisdiction.* In addition, EPA believes that both the existing statute and the new legislation express a strong mandate to take a broad view of what constitutes hazardous waste when hazardous secondary materials are burned for energy recovery, and to regulate as necessary to protect human health and the environment. See e.g., 48 FR 14502 (statutory definitions stating that secondary materials burned for energy recovery are solid wastes); H.R. Rep. 94-1491, supra at 4 (Congress' concern in promulgating Subtitle C was to "eliminat(e) the last remaining loophole in environmental law", not to create new loopholes); H.R. Rep. 98-198, supra at 41-42; S. Rep. No. 98-284 at 36.

50 Fed. Reg. at 629; 630-631 (emphasis added). As this passage makes clear, U.S. EPA contemplated regulating a waste like Respondents' hazardous waste blend when the waste is burned in a blast furnace (like WCI Steel's) to recover energy and material. Thus, a hazardous waste burned for energy recovery (here, both heat energy and chemical energy) falls within the definition of waste even if some material recovery (like recovery of carbon value) occurs. Therefore, even accepting Respondents' argument that their used oil "additive" (hydrocarbons in the form of hazardous waste) served as an

“ingredient” from which material was “recovered” for the purpose of iron making,<sup>11</sup> their additive material still falls within the definition of “waste,” because the “regulations would also apply when an industrial furnace burns the same secondary material for both energy and material recovery.” *Id.* at 630. Respondents have presented no issue of material facts that prevents this Court from entering judgment against them.

Not happy with the inescapable conclusion that U.S. EPA made clear its intention to regulate Respondents’ hazardous waste blend as a “solid waste,” Respondents want to turn back time and urge adoption of a regulatory interpretation suggested in the preamble to the proposed definition of solid waste that was not adopted.<sup>12</sup> As explained in the preamble to the proposed definition of solid waste:

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<sup>11</sup> Liquid hydrocarbon does not act as an ingredient, and does not contribute ingredients, to iron when it is combusted in a blast furnace at the tuyere level. Fruehan Supp. Decl. at ¶ 21 (attached to U.S. EPA’s Response).

<sup>12</sup> Respondents take the bizarre position that this Court should de facto re-write the definition of solid waste published in the Code of Federal Regulations by instead adopting the proposed definition of solid waste that U.S. EPA rejected. Respondents’ Response at pp. 33-34. When comparing the language of the final definition of “solid waste” published at 50 Fed. Reg. 664 to the language of the proposed definition of “solid waste” published at 48 Fed. Reg. 14508, it is apparent that the definitions and exclusions are nothing alike. Accordingly, when Respondents argue that the Court should reject U.S. EPA’s interpretation of its definition (as published in the final rule’s preamble) and instead adopt the position of the Respondents, they are really asking for the Court to re-write the regulations themselves. Respondents are mounting nothing more than an

In interpreting this provision, the Agency does not consider materials to be burned as fuels when both material values and energy are recovered from burning a single material, and material recovery is an important part of the recovery operation. For example, furnaces burning secondary materials to recover economically significant amounts of contained chemicals, and that also recover energy from the same materials, are not considered to be burning the materials as fuels.

48 Fed. Reg. 14472 at footnote 19. Under this approach, Respondents' hazardous waste blend would fall outside the definition of solid waste, because the proposed definition was interpreted to exclude materials burned for *both* material values and energy recovery. Unfortunately for Respondents, this approach was expressly rejected by U.S. EPA. As explained by U.S. EPA in the preamble to the final definition of solid waste, in light of the strong mandate in the law "to take a broad view of what constitutes hazardous waste when hazardous secondary materials are burned for energy recovery, and to regulate as necessary to protect human health and the environment:"

[W]e thus reconsider and withdraw footnote 19 of the preamble to the proposed rule where we said we would count materials burned in industrial furnaces for both energy and material recovery as being burned for material recovery. For the reasons given above, we think that was a mistaken idea.

50 Fed. Reg. at 631.

For the forgoing reasons, this Court should reject Respondents' argument that the preamble to the proposed definition of "solid waste," rather than the preamble to the final definition, controls the interpretation of the plain regulatory language. This Court should also reject the questionable scientific conclusion that "energy" is bonded to the iron in the blast furnace and that carbon is added to iron as the result of combusting liquid

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untimely challenge (in the wrong forum) to the adopted definition of solid waste published at 40 C.F.R. § 261.2.

hydrocarbons at the tuyere level of a blast furnace. Simply, the Court should reject the claim that Respondents' used oil and hazardous waste blend is an "ingredient" used in the manufacture of iron when it is burned for "material recovery" and, thus, a "recycled" material outside the definition of "waste." Instead, Respondents' used oil and hazardous waste blend is burned for the recovery of heat and chemical energy. The contribution of material that hypothetically could be incidental to the combustion of Respondents' hazardous waste blend simply does not lift their blend out of the definition of "waste."

**D. Alternatively, Unitene LE and Unitene AGR Are Commercial Chemical Products**

Should this Court find that Unitene is not a regulated by-product, EPA asserts that Unitene is regulated because it is a commercial chemical product that was burned for energy recovery. Respondents' contend that [REDACTED]

[REDACTED] In so doing, Respondents insert the word "discarded" into the regulation where it is not present. In actuality, the word "discarded" appears in a segment of the regulation that EPA does not contend is applicable to the facts at issue. The regulations read as follows:

The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded as described in paragraph (A)(2)(a) of rule 3745-51-02 of the Administrative Code, when they are mixed with waste oil or used oil or other material and applied to the land for dust suppression or road treatment, when they are otherwise applied to the land in lieu of their original intended use or when they are contained in products that are applied to the land in lieu of their intended use, or when, in lieu of their intended use, they are produced for use as (or as a component of ) a fuel, distributed for use as a fuel, or burned as a fuel.

OAC § 3745-51-33. The above language presents four distinct instances when a commercial chemical product can be deemed a hazardous waste. In asserting that commercial chemical products must be discarded, Respondents are limiting their focus to

the first instance only. However, the regulation explicitly states that materials are also hazardous wastes when, in lieu of their intended use, they are burned as a fuel. *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Despite their assertion that all commercial chemical products must be discarded, Respondents do acknowledge that commercial chemical products that are burned for energy recovery are hazardous wastes. *See* Respondents' Response at p. 36. In so doing, Respondents attempt to rely on the exemption to that rule, by stating that materials that are, themselves, fuels can be permissibly burned for energy recovery. *See* OAC § 3745-51-02(C)(2)(b) [40 C.F.R. § 261.2(c)(2)(b)]. [REDACTED]

[REDACTED]

[REDACTED] However, simply because a material is burned for energy recovery, it does not follow that the material is a fuel, *itself*. In other words, not all materials that are capable of providing energy should be burned as a fuel. It is true that the burning of Unitene will provide energy, as evidenced by the operation of the WCI Steel blast furnace. However, as discussed in detail in Complainant's Response at pp. 36-43, [REDACTED]

[REDACTED]

[REDACTED]. Therefore, Unitene does not satisfy the exception in OAC § 3745-51-02(C)(2)(b) [40 C.F.R. § 261.2(c)(2)(b)].

Finally, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**E. Respondents Forster and Lofquist are Directly Liable as Officers of the CIS Facility**

The record shows that Respondents Forster and Lofquist are directly liable as operators under RCRA in this matter. *See* Section V.A.5 of Complainant's Motion. Respondents mistakenly argue that EPA has misinterpreted law and policy, as well as misstated facts. In support of their argument, Respondents focus on the holding in *In the Matter of Southern Timber Products, Inc. D/B/A Southern Pine Wood Preserving Company and Brax Batson*, RCRA (3008) Appeal No. 89-2, 1992 EPA App. LEXIS 15 at \*\*23-35 (Feb. 28, 1992).

EPA discussed this case in detail in Section VII of Complaint's Response to Respondents' Motion for Accelerated Decision ("Complainant's Response"), but the case bears further scrutiny due to its role as the leading case on this issue and Respondents' emphasis on the case and their incorrect interpretation of the opinion. In *Southern Timber*, the Secretary/Treasurer (Brax Batson) of a corporation was not shown to be an operator and thus not personally liable. The court noted while "[i]t is beyond serious

doubt that a facility may have more than one operator where responsibility for the overall operation is shared among two or more persons”, “[t]his is not to say that one who has any operational responsibility at a RCRA facility is an operator.” *Id.* at \*\*23 and 25.

The court’s emphasis was on whether the officer of a corporation has active and pervasive control over the overall facility operations. *Id.* at \*\*32 and 34. The court then looked at three decisions which had applied the term “operator”. First was a state court case, *Wisconsin v. Rollfink*, 475 N.W.2d 575 (Wis. 1991), where the court relied upon several factors<sup>13</sup> to find a corporate officer liable as an “operator” and “established a liability standard rooted in the definition of “operator” itself: whether the corporate officer or shareholder is responsible for the overall operation of the facility”. *In the Matter of Southern Timber Products*, 1992 EPA App. LEXIS at \*29. The issue before the *Rollfink* court was whether the officer has sufficient ownership and control over the

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<sup>13</sup> The Court looked at the following factors: the officer owned at least 51 percent of the company stock; the officer served as President, Chairman of the Board, and Chief Executive Officer of the company; the officer hired and fired employees; the officer had the power to direct and control all company employees (including the employees who were in charge of waste disposal); the officer was present at the facility almost every day, frequently inspected the production area, and constantly intervened in the operation of the facility; the officer made all of the financial decisions concerning the facility, handled all disputes with vendors and customers, and had general knowledge of the entire operation of the facility; and the officer ultimately made all decisions and resolved all problems concerning the facility’s operations and had ultimate authority and control over the facility. 475 N.W.2d at 580-81.

company to be held individually liable where “he was not involved in any wrongdoing”. *Id.* at \*25. Contrast this with the instant case, where, as demonstrated in Section V.A.5 of Complainant’s Motion and Section VII of Complaint’s Response, Respondents Forster and Lofquist were intimately involved in the wrongdoing at issue, detailed in Section V.A.5 of Complainant’s Motion.

Next was a federal case, *U.S. v. Environmental Waste Control, Inc.*, 710 F.Supp. 1172 (N.D.Ind. 1989), *aff’d*, 917 F.2d 327 (7<sup>th</sup> Cir. 1990), where “[a]lthough the Court ultimately imposed liability upon [a corporate officer]” by relying upon several factors<sup>14</sup>, on summary judgment the Court had “rejected the argument that substantial activity at a RCRA facility by a corporate officer standing alone automatically renders him an operator”. *In the Matter of Southern Timber Products*, 1992 EPA App. LEXIS at \*30. Significantly, on summary judgment, the Court noted that the pre-trial record left “room

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<sup>14</sup> The Court looked at the following factors: the officer was the founder, President, and at times sole shareholder of the company; the officer signed documents submitted to EPA that affirmatively identified him three times as the facility operator; the officer leased the property on which the facility was located and was personally liable under the lease; the officer and the owner of the property on which the facility was located exercised co-equal control over the facility; the officer devoted all of his business time to the facility and was the principal decision maker with respect to hiring consultants, accepting their advice, purchasing equipment, and deciding whether proposed improvement would be carried out; the officer was intimately involved in the facility’s day-to-day operations and he personally guaranteed an open-ended loan to the company. *Environmental Waste Control, Inc.*, 710 F.Supp.at 1181-82.

for the inference that, while [the president] was active in the doings of the landfill, his activities were not so extensive as to make him an “operator”. *U.S. et al. v.*

*Environmental Waste Control, Inc.*, 698 F. Supp. 1422, 1428-30 (N.D. Ind. 1988).

Contrast that the with the instant case, where, as demonstrated in Section V.A.5 of Complainant’s Motion and Section VII of Complainant’s Response, the activities of Respondents Forster and Lofquist were extensive enough to make them directly liable as operators under RCRA.

Third was another federal case, *U.S. v. ILCO, Inc.*, No. CV85-H-823-S, 1990 U.S. Dist. LEXIS 20976 (N.D.Ala. Dec. 10, 1990), where the court relied upon several different factors<sup>15</sup> in determining that a corporate officer was liable as an “operator.” *In the Matter of Southern Timber Products*, 1992 EPA App. LEXIS at \*32.

The *Southern Timbers* court compared the facts it had to the factors examined in the other three cases and ultimately determined that the record did not establish that the corporate officer, Brax Batson, exercised such “active and pervasive control” over the

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<sup>15</sup> The Court looked at the following factors: the officer was President, majority shareholder, Chief Operating Officer, and Chairman of the Board of the company; he directed and controlled the company; he was in charge of the daily operations of the facility; he had the authority to hire and fire company employees; he signed, certified or authorized all regulatory submissions; he authorized major expenditures at the facility (including those pertaining to environmental compliance); he directed and controlled company policy decisions; and he was personally involved with, and had final authority for, the company’s decisions regarding regulatory compliance. *See In the Matter of Southern Timber Products*, 1992 EPA App. LEXIS at \*31.

overall facility operations as to justify finding him to be an “operator”. *In the Matter of Southern Timber Products*, 1992 EPA App. LEXIS at \*34. Nowhere did the court in *In the Matter of Southern Timber Products* expressly reject “U.S. EPA’s interpretation of the operator definition to include any corporate officer who authorizes, controls, or personally participates in the violating activity”. Respondents’ Motion at 64. In fact, in the cases that the Southern Timber court cites, whether the corporate officer in question authorized, controlled or personally participated in the violating activity was considered. For example, whether the officer was personally involved with, and had final authority for, the company’s decisions regarding regulatory compliance was one of the factors considered in *ILCO. U.S. v. ILCO, Inc.*, 1990 U.S. Dist. LEXIS 20976.

Also significant are the administrative cases following *Southern Timbers* which have involved direct operator liability under RCRA and relied on its holding. This Court relied on *Southern Timbers* in *In the Matter of Zaclon, Inc.*, Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 19 (April 21, 2006), when it found that EPA had made a colorable claim that two officers were directly liable as operators under RCRA where those individuals had responsibility for the overall operation of the facility. *Id.* at \*\*17-18. This Court considered the exact factors EPA examined in Section V.A.5 of Complainant’s Motion<sup>16</sup>. Similarly, in *In the Matter of J.V. Peters and Company*, Docket

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<sup>16</sup> The factors examined in *Zaclon* and Complainant’s Motion are: role in the corporation; percent of stock ownership in the corporation; involvement in the activity at issue; authority in making financial decisions for the facility; involvement and authority in decision-making as to the facility’s operation and compliance with laws and regulations at issue; and documents submitted to EPA identifying the individual as

No. V-W-81-R-75, 1995 EPA ALJ LEXIS 40 (July 18, 1995), the Court found an officer directly liable under RCRA where: he admitted to being responsible for the operations of the facility; he organized the operation and acquired the property for it; he was engaged in the daily running of the operation; and he made the decisions as to the facility's compliance with RCRA. *Id.* at \*29. Finally, in *In the Matter of Everwood Treatment Co., Inc.*, Docket No. RCRA-IV-92-15-R (July 7, 1995), the Court found an officer liable where he and his wife were the sole shareholders of the company and he directed the activities which constituted the violation (the placement of contaminated soil in the containment unit). *Id.* at \*\*89-90. Like the court in *Everwood*, this Court should consider the involvement of Respondents Forster and Lofquist in directing the activities which constituted the violations.

Moreover, Respondents also assert that "EPA attempted to rely on [the Stein/Diamond Memo] as support for considering an individual's involvement in the "activity at issue" as establishing operator status." Respondents' Response at 39. In fact, EPA only relied on the 1990 Stein/Diamond Memo for the notion that EPA has a history and policy of pursuing corporate officers liable under RCRA Section 3008, 42 U.S.C. §6928, due to their personal participation in the corporate action which violated RCRA. Complainant's Motion at 59. EPA did not cite to the 1990 Stein/Diamond Memo for factors to consider in determining liability – for that, EPA cited to *Southern Timber* and related cases. Complainant's Motion at 57-59. But even if EPA had relied on the 1990 Stein/Diamond Memo, the instant case would not result in penalizing an officer in the

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facility operator and not just corporate representative. *Zaclon*, 2006 EPA ALJ LEXIS at \*18; Section V.A.5 of Complainant's Motion.

ways the *Southern Timber* Court found troubling – where an officer “arrives at a facially reasonable but ultimately incorrect reading of a RCRA rule” or where an officer’s actions were “reasonable”. Here, Respondents Forster and Lofquist both directly and indirectly asked regulators if their alleged “facially reasonable” interpretation of the RCRA was correct, regulators responded that their interpretation was incorrect, and the Respondents then simply *ignored the advice of the regulators*,<sup>17</sup> and proceeded to treat and store over 8.5 million pounds of hazardous waste at the CIS facility while failing to comply with the applicable RCRA regulations. This type of behavior by a member of the regulated community is arguably the *very height* of unreasonable.

As is detailed in the Complainant’s Motion and Complainant’s Response, when one examines the factors laid out in *Southern Timbers* and *Zaclon*, there is only one conclusion to make: Respondents Forster and Lofquist are directly liable as operators under RCRA. Significantly, Respondents show the most discomfort with one factor: involvement in the activity at issue. They erroneously state that EPA relies on this factor alone to establish direct officer liability, rather than examine the several different factors which were examined in *Southern Timbers*. Respondents’ Response at p. 40. In reality,

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<sup>17</sup> Ohio EPA expressed concerns regarding the regulatory status of such hazardous waste in an email dated July 12, 2005. Ohio EPA explicitly determined that such hazardous waste must be treated as such (and was not somehow exempt) under the regulations in emails dated October 2005, December 2005 and February 2005. U.S. EPA also explicitly determined that the hazardous waste must be treated as such (and was not somehow exempt) under the regulations in a letter dated December 9, 2005. The vast majority of the waste shipments at issue in the Complaint occurred after these dates.

EPA systematically analyzed each of the *Zaclon* factors. See Complainant's Motion at Section V.A.5. Respondents continue their argument by asserting that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In fact, as

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Respondents Forster and Lofquist are directly liable as

operators under RCRA in this matter.

**F. Respondents Have Not Successfully Raised the Fair Notice Doctrine Affirmative Defense**

Having already been rebuffed by this Court once in their attempt to raise the affirmative defense of "fair notice", Respondents try again in their Response. Order on Complainant's Motion to Strike Affirmative Defenses at 6-7; Respondents' Response at pp. 43-48. As noted in the Consolidated Rules, Respondents have the burden of presentation and persuasion for any affirmative defense. 40 C.F.R. § 22.24(a).

Respondents have not met that burden here.

The leading case on the "fair notice" affirmative defense is *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). In that case, the General Electric Company ("GE") was disposing of transformers contaminated with PCBs via the "drain-and-landfill" method

prescribed by 40 C.F.R. § 761.60(b)(1)(i)(A). EPA had no issue with GE's techniques until GE began to distill and recycle the solvent it was using to clean the transformers, rather than landfilling the solvents immediately. GE claimed, in part, that EPA did not provide fair warning of its interpretation of its regulations, in violation of the due process clause of the United States Constitution. The Court found that to determine whether the violator has received notice:

we must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

*Id.* at 1329.

Based on this articulated standard, the Environmental Appeals Board elaborated on what is required for adequate notice:

[P]roviding fair notice does not mean that a regulation must be altogether free from ambiguity. Indeed, the case law shows that even where regulatory ambiguity exists, the regulations can still satisfy due process considerations. \* \* \* Thus, the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community.

*In re: Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, 2003 EPA App. LEXIS 4 at \*(May 6, 2003)(quoting *Tenn. Valley Auth.*, 9 E.A.D. at 412).

These cases were cited with approval in the leading Environmental Appeals Board (EAB) case on "fair notice", *In re: Howmet Corp.*, Docket No. RCRA (3008) Appeal No. 05-04, 2007 EPA App. LEXIS 19 (May 24, 2007). In that case, EPA alleged a violation of RCRA related to Howmet's shipment of used potassium hydroxide to a

fertilizer manufacturer. Howmet argued that EPA had failed to provide fair notice, but the EAB did not agree, finding instead that Howmet did have fair notice that its material would be subject to RCRA regulations. *Id.* at \*93. The Court in *Howmet* looked at several factors to decide whether Howmet could have determined “with ascertainable certainty” that the material would be regulated:

- the text of the regulations
- the regulations as a whole
- the regulatory history and agency interpretive guidance
- any respondent inquiries as to the meaning of the regulation at issue

*Id.* at \*\*84-93.

Respondents in this case do not specify the exact regulation for which they allege EPA did not provide fair notice, but instead focus on the one shipment of K022 from JLM to CIS on November 21, 2002 and refer to the “Recycling Rule” and state that “[t]he rule, on its face, spoke to the purpose for which materials were burned, and did not contain the word “solely” that U.S. EPA now claims should be read into the rule.” Respondents’ Response at 46. Presumably Respondents refer to OAC § 3745-51-02(C)(2)(a)(i) [40 C.F.R. § 261.2(c)(2)(i)(A)].

Looking first at the text of the regulations, Respondents appear to be arguing that the text states that materials are solid wasted if they are recycled by being “[b]urned to recover energy”, not “burned solely to recover energy”, which is what “U.S. EPA now claims should be read into the rule.”<sup>18</sup> Respondents’ Response at p. 46. In fact,

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<sup>18</sup> It is only necessary to address this issue if the Court concludes that the reducing gases are an ingredient in the final product. See Section V.A.3.a.1.b.iii. of Complainant’s Motion and Section II.C, above.

Respondents are mistaken. EPA does not read “solely” into the regulation. Rather, EPA has taken the position that “burned to recover energy” includes materials burned solely for energy recovery *and* materials burned for both energy recovery and materials recovery. EPA reads this language broadly.

Under *Howmet*, the second area to examine is: the regulation as a whole. Looking to OAC § 3745-51-02 [40 C.F.R. § 261.2], EPA’s reading of “burned to recover energy” is consistent with the regulation as a whole. The regulation provides that definition of “solid waste”. *Id.* It starts by explaining that a “solid waste” is a “discarded material.” OAC § 3745-51-02(A)(1)[40 C.F.R. § 261.2(a)(1)]. Further, a “discarded material” is any material which is “recycled”. OAC § 3745-51-02(C) [40 C.F.R. § 261.2(a)(2)(i)(B)]. The regulation continues by listing four ways in which a material is “recycled”. OAC § 3745-51-02(C) [40 C.F.R. § 261.2(c)] . One of those ways is by being burned for energy recovery. OAC § 3745-51-02(C)(2)(a)(i) [40 C.F.R. § 261.2(c)(2)(i)(A)]. The position that “burned to recover energy” includes materials burned solely for energy recovery *and* materials burned for both energy recovery and materials recovery in no way contravenes the regulation as a whole. Also, this reading is consistent with EPA’s overall approach in the RCRA regulatory scheme of caution when approving of the burning of materials – particularly hazardous waste, as described in EPA’s RCRA Orientation Manual:

In the early years of RCRA, EPA intended for facilities to combust as much hazardous waste as possible and landfill the resultant ash. This process destroyed the majority of the waste, thus reducing the volume requiring disposal. However, it was determined that incomplete or improperly conducted combustion had the potential to present a major public health risk, and therefore, became the topic of much public outcry. This public concern, coupled with EPA’s advancements in assessing potential risks arising from combustion, caused a shift in EPA’s strategy

on combustion. This shift in thinking resulted in the increasing stringency of combustion requirements over time.

RX88 at CIS.

The third area of inquiry is the regulatory history and agency interpretive guidance. Here, EPA stated very plainly in its preamble to the regulation that “burned to recover energy” includes materials burned solely for energy recovery *and* materials burned for both energy recovery and materials recovery:

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

50 Fed. Reg. at 614, 630-31(citations omitted). EPA has been consistent with this application, as shown in a July 20, 1994, letter from EPA to a member of the regulated community regarding a material which had both a high heating value and was high in sulfur content and being used in sulfuric acid regeneration furnace where sulfur was converted to sulfuric acid (Attachment A). In that letter, EPA concluded that “EPA would consider this practice to be a type of burning for energy recovery rather than use of an ingredient to produce a product. Attachment A at 2. Respondents assert that initially EPA’s guidance on this issue was inconsistent, and “[i]nitially, U.S. EPA indicated that material burned for both material recovery and energy recovery would not be regulated, and it issued several regulatory guidance letters with this interpretation.” However,

Respondents refer to no exhibit and Respondents attach no such guidance letters. It is completely unclear to what Respondents are referring.

Finally, in determining whether EPA gave Respondents fair notice, one must look at any respondent inquiries as to the meaning of the regulation at issue. Here, unlike *Howmet*, the Respondents actually did ask both directly and indirectly asked regulators about the status of the material in question, and regulators responded that the material was RCRA-regulated. *See* Section II.E, above. In this instance, not only did the regulation provide the Respondents with fair notice, but the regulators actually provided their interpretation of the regulations as applied to the material in question in the Complaint. Not only did Respondents have fair notice, but they had *actual* notice of the meaning of the regulation.

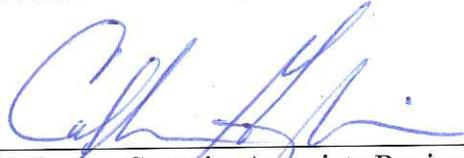
### **III. Conclusion**

In this case, all of the evidence indicates that the Respondents knew their theory that the types of hazardous wastes they were treating and storing were not regulated as was questionable. So much so, they approached regulators and regulators confirmed that the material was in fact regulated. Knowing this, the Respondents continued to store and treat the hazardous waste, hoping that they simply would not be caught. Tellingly, only after they were caught did Respondents begin to formulate a number of post-hoc rationalizations that culminated in many of the assertions made in Respondents' Motion and Respondents' Response. All of Respondents' arguments are unpersuasive. EPA has clearly shown that the Respondents treated and stored hazardous waste at the CIS facility without applying for or obtaining a RCRA permit and without complying with various other RCRA requirements. Furthermore, Respondents Forster and Lofquist are directly

liable under RCRA for the violations at the CIS facility. Finally, Complainant has shown that there is no genuine issue as to any material fact and Complainant is entitled to judgment as a matter of law.

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4/13/12  
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**ATTACHMENT A**

July 20, 1994, letter

9498.1994(06)

United States Environmental Protection Agency  
Washington, D.C. 20460  
Office of Solid Waste and Emergency Response

July 20, 1994

Ms. Susan Ferguson  
Director, Industrial and  
Hazardous Waste Division  
Texas Natural Resource  
Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

Dear Ms. Ferguson:

Thank you for your letter dated April 7, 1994, requesting clarification of the exclusion from the Resource Conservation and Recovery Act (RCRA) regulation for secondary materials that are used or reused directly as ingredients in an industrial process to make a product (40 CFR 261.2(e)(1)(i)). Specifically you asked for an interpretation of this exclusion as it applies to a process employed by Rhone-Poulenc in which a secondary material that has a high heating value and is high in sulfur content is being burned in a sulfuric acid regeneration furnace.

EPA addressed the question of how the burning of high heating value secondary materials is regulated in its February 21, 1991 Final Rule on Burning of Hazardous Wastes in Boilers and Industrial Furnaces (BIF) (56 FR 7134). In that rule, the Agency makes a distinction between the excluded activity of burning hazardous waste solely as an ingredient (§261.2(e)(1)(i)), and the regulated activity of burning hazardous waste for energy recovery. Specifically, as provided under §266.103(5)(ii)(B) of the interim status standards for BIFs, a hazardous waste is burned for a purpose other than solely as an ingredient if the hazardous waste has a heating value of 5,000 Btu/lb or more, as generated or as-fired. Under this provision, hazardous waste with a 5,000 Btu/lb or greater heating value is considered to be burned as fuel (i.e., burning for energy recovery).

EPA also relied on this distinction in crafting a conditional

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exemption from RCRA regulation for smelting, melting, and refining furnaces that burn waste to recover metals. Under 40 CFR 266.100(c), burning hazardous waste in a BIF for metals recovery is exempt only when the device burns hazardous waste exclusively for metal recovery and not partially for destruction or energy recovery as well. Again, to clarify what constitutes energy recovery, the rule provides that a waste with a heating value of 5,000 Btu/lb or more (either as generated or as fired) is burned (at least partially) as a fuel.

The regulatory distinction between burning as an ingredient and for energy recovery provided in the BIF rule is applicable to the situation you describe in which a high sulfur content, high heating value secondary material is fed into a sulfuric acid regeneration furnace where the sulfur in the stream is converted to sulfuric acid. Consequently, under existing regulations, even though sulfur is being used to produce sulfuric acid in this situation, EPA would consider this practice to be a type of burning for energy recovery rather than use of an ingredient to produce a product because of the high Btu/lb value of the secondary material (i.e., 12,000-16,000 Btu/lb.). As provided under §261.2(e)(2)(ii), secondary materials that are burned for energy recovery are solid wastes even if they are recycled by being used or reused as an ingredient in an industrial process to make a product. In other words, if the materials are being burned for energy recovery, the §261.2(e)(1)(i) "use as an ingredient" exclusion does not apply.

In its letter to the Texas Natural Resource Conservation Commission, Rhone-Poulenc argues that the secondary materials are covered under §261.4(a)(7) which exempts spent sulfuric acid that is used to produce virgin sulfuric acid. In this case, however, the §261.4(a)(7) exclusion does not apply because the secondary materials in question are not spent sulfuric acid.

Having provided you with a determination of how existing RCRA regulations would apply in the situation you describe, you should note that EPA is in the process of developing a comprehensive hazardous waste combustion strategy. A key component of the combustion strategy is the review and evaluation of the current regulations for incinerators and BIFs burning hazardous waste in order to make them more readily implementable, clarify ambiguities, and address concerns that have arisen since the regulations became effective. The combustion strategy staff would be happy to meet with you or representatives of Rhone Poulenc to discuss concerns

they have raised about the Agency's burning for energy recovery policy as well as any ideas they have for revising the regulations to address those concerns. Please contact Bob Holloway at (703) 308-8461 if you wish to revisit this matter in the context of the combustion strategy effort.

If you have additional questions regarding application of the existing RCRA regulations as they pertain to this case or in general, please contact Mitch Kidwell at (202) 260-8771 or Becky Daiss at (202) 260-8718.

Sincerely,

Michael Shapiro, Director  
Office of Solid Waste

**CERTIFICATE OF SERVICE**

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

I certify that the foregoing "Complainant's Reply to Respondents' Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision", dated April 13, 2012, was sent this day in the following manner to the addressees listed below:

Original and one copy hand-delivered to:

Regional Hearing Clerk  
U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604

Copy via overnight mail to:

Attorneys for Respondents:

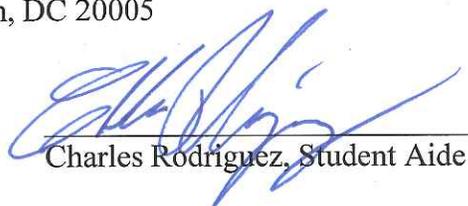
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Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge  
U.S. EPA Office of the Hearing Clerk  
1099 14th St. NW  
Suite 350, Franklin Court  
Washington, DC 20005

4/13/12  
Date

  
Charles Rodriguez, Student Aide

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