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

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

RESPONSE OF APPELLANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO RESPONDENT'S MOTION TO STRIKE

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I. Introduction

The United States Environmental Protection Agency ("Appellant EPA") submits this "Response of Appellant United States Environmental Protection Agency to Respondent's Motion to Strike" pursuant to Rule 22.16 of EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. § 22.16. The "Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's Motion to Strike," ("Motion to Strike") filed September 21, 2015, is rife with factual and legal error.

The Respondents' Motion to Strike asserts two main points: (1) mention of top gases should be stricken from this proceeding and (2) the blast furnace gas utilization study (submitted as Attachment A to the September 14, 2015, Response Brief of the United States Environmental Protection Agency ("EPA Response Brief")), should not be officially noticed in these proceedings. Respondents are wrong on both points.

II. Discussion

A. Analysis of Top Gases are an Important and Integral Part of These Proceedings

Respondents assert that Appellant EPA is "for the first time without any notice of appeal" making arguments about top gases and burden of proof, which are not the subject of *sua sponte* review, and should be "disregarded and stricken from these proceedings." Motion to Strike at 2. To begin, discussion of top gases is clearly appropriate in response to the Board's initial question 4:

> 4) Did the hydrocarbon materials distributed by Carbon Injection Systems to WCI Steel, Inc., supply substantial, useful heat energy upon combustion in the raceway of WCI Steel's iron blast furnace? *Specifically, the Board requests that you address the ALJ's determination that the hydrocarbon materials supplied by Carbon Injection Systems did not contribute substantial, useful energy to the WCI*

Steel iron blast furnace 'because of their net consumption of energy and consequential cooling effect in the raceway.' Initial Decision at 83"

July 14, 2015, Order Identifying Issues to Be Briefed (emphasis added). Any discussion of whether or not the hydrocarbon materials supplied by Carbon Injection Systems contributed substantial, useful energy to the WCI Steel iron blast furnace in these proceedings properly includes a discussion of top gases. Additionally, Respondents raised the issue of top gases *of their own accord*, in their August 18, 2015, Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's Opening Brief ("Respondents' Opening Brief"). Respondents' Opening Brief at pp. 32-33. EPA in no way "exceeded the scope of the Board's directive" in this matter, as decried by Respondents in their Motion to Strike. Motion to Strike at p. 2.

In the Motion to Strike, Respondents yet again attempt to obfuscate matters in these proceedings by arguing that Appellant EPA is answering a burden of proof question not asked by the EAB. However, EPA clearly and distinctly responded to the question raised by the Board regarding burden of proof in Section II.E of the August 18, 2014 Opening Brief of the United States Environmental Protection Agency ("EPA Opening Brief") and Section IV. of the EPA Response Brief. While Appellant EPA also discusses burden of proof in Section III.A. of the EPA Response Brief, it is unreasonable to expect Appellant EPA not to respond to Respondents' repeated statements in the Respondents' Opening Brief that Appellant EPA failed to meet its burden of proof at hearing. Respondents' Opening Brief at 24, n. 10, 34, 36.

Respondent also argues that Appellant EPA did not appeal the Initial Decision, and is therefore limited to the questions posed by the Board. EPA agrees with this statement. Appellant EPA thus limited arguments raised in the EPA Opening Brief to the scope of the questions raised by the Board, while arguments raised in the EPA Response Brief address only those matters

raised in the Respondents' Opening Brief that require correction and/or clarification.[1] Of course it is completely appropriate for the parties to point out to the Board where they believe the Presiding Officer may have erred regarding the issues raised by the Board, especially given that the Board has asked the parties to provide their positions on those issues and the Board is likely interested in knowing where those positions are at odds with the Presiding Officer's conclusions.

B. It Is Appropriate For the Board to Take Official Notice of the Blast Furnace Gas Utilization Study in These Proceedings

It is appropriate for the Board to consider the blast furnace gas utilization study in these proceedings. Under Part 22, official notice can be taken by the EAB in certain circumstances:

> (f) Official notice. Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

40 C.F.R. § 22.22(f).[2] *See also* F.R.E. 201 (Judicial Notice of Adjudicative Facts). Official notice under Section 22.22(f) is applicable to the blast furnace gas utilization study cited by Appellant EPA in these proceedings. Specifically, official notice may be taken of the blast furnace gas utilization study since such a document can be judicially noticed in the Federal courts.

As recently as one year ago, the Board addressed the issue of "official notice" in *In re Footprint Power*, PSD Appeal No. 14-02 slip op. at 39, n. 38 (citing to *In re Russell City Energy*

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[1] Respondents also object to use of the label "Appellant" in this case. Motion to Strike at 4. Appellant EPA acknowledges that it did not file a notice of appeal in this matter. However, the Clerk of the Board is using the term "Appellant," and Appellant EPA believes this label is appropriate so as to differentiate that part of EPA which is a party in this matter and that part of EPA which is serving to adjudicate this matter (the EAB).

[2] Appellant EPA indicated in the EPA Opening Brief and the EPA Response Brief that official notice (also known as "administrative notice" or "judicial notice") should be taken of the blast furnace gas utilization study, which is Attachment A to Appellant EPA's Response Brief. *See* EPA Opening Brief at p. 29, n. 20; EPA Response Brief at p. 7, n 7.

Ctr, LLC, PSD Appeal Nos. 10-01 through 10-05, slip op. at 47-48 (EAB Nov. 18, 2010) (In this challenge to the issuance of a Clean Air Act construction permit based in part on the ground that the permit issuer relied on incorrect data in its cost-effectiveness analysis, the Board stated that it may take "official notice" of "public documents such as statutes, regulations, judicial proceedings, public records, and Agency documents." The Board in fact took official notice of a permit application for the construction of a different facility, which a permit challenger was using to support its own cost estimate, since that permit application fell "within the general category of public documents of which the Board will take official notice," while declining to take official notice of an e-mail which did not meet this criterion), *aff'd sub. nom Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012)). In *Footprint*, the Board relied on United States Census information located on a website to support the statement that "[c]ensus data shows that Lynn has almost twice as many people per square mile than Salem" (information which supported a party's position that Lynn is more densely settled than Salem). Significantly, in its decision in *In re Stevenson et al.*, CWA Appeal No. 13-01, slip op. at 4, n. 1 (EAB Oct. 24, 2013), the Board relied on a document contained in a Texas A & M library website that *neither of the parties had cited* to support the Board's description of the physical location of the river on which alleged wetland violations had occurred. *See also In re Howmet Corporation*, 13 E.A.D. 272, 288 at n. 32 (EAB 2007), *aff'd*, *Howmet Corp. v. EPA*, 656 F. Supp.2d 167 (D.D.C. 2009), *aff'd*, *Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010) (wherein the Board took official notice of a document not cited by the parties, noting that the document "stands as further indication of how the Agency viewed the use of hazardous secondary materials in the manufacture of fertilizer"); F.R.E. 201(c)(1). The Board has also found when taking official notice of a document, it is significant where (as here) one party cites

to the document for which official notice is sought in a brief, and the other party subsequently has the opportunity to address the contents of that document. *See In re Indianapolis Power & Light Co.*, 6 E.A.D. 23, 29, n. 12 (EAB 1995) (a Clean Air Act permit proceeding wherein the Board took official notice of a document issued by EPA to respond to a public comment to a proposed rule although the comment/response was not contained in the preamble to the final rule, stating "[t]his document does not appear to have been specifically cited in the permit proceedings below. However, it was cited in the OGC Appeal Brief...and [the opposing party] had the opportunity to address it in its supplemental brief, although it did not."). *See also* F.R.E. 201(d).

The cases cited by Respondents are not persuasive. In *Passa v. Columbus*, 123 Fed. Appx. 694 (6th Cir. 2005), the plaintiff was asserting that a City mediation program violated federal and state laws. Ruling on a motion to dismiss, the District Court found the plaintiff had failed to state a claim based in part on information found on the City's website which described the purpose of the program. The Sixth Circuit vacated and remanded after a *de novo* review. The Sixth Circuit noted that in ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(2), a court generally may not consider any facts outside the complaint and exhibits attached thereto. In ruling on the motion to dismiss, the District Court had taken notice of information on the City's website. The Sixth Circuit noted that "a court may take judicial notice of at least some documents of public record when ruling on a Rule 12(b)(6) motion," however, most courts ruling on this issue "have held that the use of such documents is proper only for the fact of the documents' existence, and not for the truth of the matters asserted therein." *Id.* at 697. Further, "in general a court may only take judicial notice of a public record whose existence or contents prove facts whose accuracy cannot reasonably be questioned." *Id.* According to the

Sixth Circuit, the primary issue is that "there is no way for an opposing party, prior to the issuance of the court's decision, to register his or her disagreement with the facts in the document of which the court was taking notice…[t]hus in order to preserve a party's right to a fair hearing, a court, on a motion to dismiss, must only take judicial notice of facts which are not in reasonable dispute." *Id.* These proceedings are in a much different posture. In this case, there was a great deal of discovery (including depositions, which are relatively rare in proceedings under Part 22), a full hearing, extensive post-hearing briefing, and briefing before the EAB. At each of these stages, the role of top gases in blast furnace operations was at issue. The language of *Passa* regarding a motion to dismiss is simply not applicable to these proceedings. Respondents' reliance on another case involving a motion to dismiss is misplaced for the same reason. *See U.S. ex. Rel., Calilung v. Ormat Indus.*, No. 3:14-cv-0325, 2015 U.S. Dist. LEXIS 37874 at **19-27 (D. Nev. 2015) (where in deciding a motion to dismiss, the District Court granted a party's request for judicial notice of multiple documents, with the caveat that statements in certain documents would be noticed only as to the fact that the statements were made and not that they are necessarily the truth).

Similarly, the other three cases cited by Respondents in their Motion to Strike are not relevant. *U.S. v. Console*, 13 F.3d 641 (3d Cir.1993) involved the appeal of judgments of conviction and sentences entered by a District Court. The case does not address the issue of judicial notice. The Respondents cite that portion of the *Console* decision addressing admissibility of testimony regarding a telephone conversation for the proposition that "in order to be admissible, evidence, must be authenticated 'by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* at 660-661. What Respondents fail to realize is that the standard for admissibility of evidence in a criminal case is completely

different than the standard for judicial notice of adjudicative facts under F.R.E. 201 (under Rule 201(b), "The Court may judicially notice a fact that is not subject to reasonable dispute because it:...(2) can be accurately and readily determined from sources whose accuracy cannot be reasonable questioned."). Similarly, *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), is cited for its explanation of hearsay, which is irrelevant in the context of judicial notice.

Here, EPA is asking that the blast furnace gas utilization study be noticed as information from the steel mill industry regarding blast furnace gas utilization by most United States iron making blast furnaces still in operation in 1986, including the WCI blast furnace to which Carbon Injection System later supplied hydrocarbon materials for injection. Combined with other evidence on the record, namely CX86 and the descriptions provided by the expert witnesses for both Appellant EPA and Respondents as to how top gases are generated and used in a blast furnace system, Appellant EPA believes there is sufficient evidence to show that the Carbon Injection System hydrocarbon materials injected into the WCI blast furnace generated top gas which was used to heat the hot blast. EPA Response Brief at pp. 7-8. The blast furnace gas utilization study is properly the subject of official notice in these proceedings.

III. Conclusion

For the reasons cited above, Appellant EPA hereby requests that the Board deny Respondents' Motion to Strike.

Respectfully Submitted,

Counsel for EPA:

9/24/15
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CERTIFICATE OF SERVICE

In re: Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist
RCRA Appeal No. 15-1

I certify that the foregoing "Response of the United States Environmental Protection Agency to Respondents' Motion to Strike", dated September 24, 2015, was sent this day in the following manner to the addressees listed below:

An electronic filing was made to:

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9-24-2015
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