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September 18, 2015

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3332
Washington, DC 20460

RE: *In re: Carbon Injection Systems LLC, et al.*, RCRA Appeal No. 15-01 (*sua sponte* review of *U.S. EPA v. Carbon Injection Systems, Eric Lofquist and Scott Forster,* Docket No. RCRA-05-2011-009)

Clerk of the Board:

On behalf of my clients, respondents Carbon Injection Systems LLC, Eric Lofquist and Scott Forster (collectively, "Respondents"), enclosed please find two copies of the Respondents' Motion to Strike Portions of Region 5's Opening Brief.

If you have any questions regarding the submittal of these items, please contact the undersigned.

Very truly yours,

Meagan L. Moore

Enclosures
cc: Environmental Appeals Board (w/ encl.)
Jonathan Fleuchaus (w/ encl.)
Catherine Garypie/Jeffrey Cahn (w/ encl.)
Eric Lofquist (w/ encl.)
Scott Forster (w/ encl.)
Meagan Moore (w/o encl.)

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

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

RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER AND ERIC LOFQUIST'S MOTION TO STRIKE

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In this *sua sponte* review of the ALJ's Initial Decision, Region 5 attempts to argue for the first time without any notice of appeal that the ALJ erred when she concluded U.S. EPA failed to prove the product sold by CIS to WCI provided heat energy to the blast furnace. Region 5 also attempts to belatedly supplement the record with additional evidence that it did not introduce at the hearing in order to overcome its failure of proof. Region 5's arguments and additional evidence are flagrantly inappropriate, not least of all because: Region 5 never appealed the ALJ's Initial Decision; the Environmental Appeals Board never directed the parties to brief this issue; and the additional evidence is patently inadmissible. Accordingly, both the arguments and additional evidence should be disregarded and stricken from these proceedings.

BACKGROUND

On July 14, 2015, the Environmental Appeals Board (the "Board") issued an order to the parties that directed them to brief and answer five specific questions—including whether "the hydrocarbon materials distributed by [CIS] to [WCI] supply substantial, useful heat energy upon combustion *in the raceway* of [WCI's] iron blast furnace," and "*[w]hich party bears the burden of proof* on the various issues raised in the case[.]" (Emphasis added.)

In its Opening Brief, Region 5 exceeded the scope of the Board's directive and argued that "the CIS materials did provide substantial, useable heat energy, *assuming the WCI blast furnace used the top gases for purposes like fueling the stoves that typically are used to heat the hot air blasts*." (Emphasis added.) (Region 5's Opening Brief, at p. 29.) Region 5 then attempted to bolster its "assumption" about how the WCI blast furnace might have utilized top gases by citing to a thirty-year-old blast furnace gas utilization study prepared by and for non-governmental third-parties about the blast furnaces of *other* companies, which they exhumed from the docket for the then-proposed rule regarding the burning of hazardous waste in boilers

and industrial furnaces. (*See* Region 5's Opening Brief, at p. 29, fn.20.)

Based on this obscure document, Region 5 argues for the first time in its Response Brief, without providing any notice of appeal, that "the ALJ erred when she concluded that Appellant had not proved that the product sold by CIS to WCI provided heat energy to the blast furnace." (Region 5's Response Brief, at p. 8, fn. 9.) And Region 5 attached an unauthenticated copy of the blast furnace gas utilization study to its Response Brief as Attachment A, contending that the Board should take judicial notice of it because it can be found in the "public domain." (Region 5's Response Brief, at p. 7, fn. 7; *see also* Region 5's Opening Brief, at p. 29, fn. 20.[1])

As explained below, Region 5's's *post hoc* assignment of error, arguments, and the blast furnace gas utilization study should be disregarded and stricken from these proceedings.

ARGUMENT

A. Region 5's *Post Hoc* Assignment of Error and Arguments about Top Gases and Whether It Met Its Burden of Proof Should Be Stricken from These Proceedings.

The Board directed the parties to address *which party bears the burden of proof.* Region 5, however, argues *whether* it met its burden of proof. These are separate and distinct issues. The Board, in its July 14, 2015 Order, identified the issues for review in this *sua sponte* proceeding. The Board did not direct the parties to address whether Region 5 met its burden of proof. For this reason alone, Region 5's argument should not be considered, but should be stricken.

More importantly, however, Region 5 elected not to appeal the ALJ's Initial Decision. Fundamental principles of fair notice and finality support the conclusion that Region 5 has waived any arguments that seek to overturn or modify the ALJ's Initial Decision beyond what

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[1] Respondents maintain their arguments regarding consideration of the blast furnace gas utilization study as set forth in their Response Brief at pages 12 through 15, and incorporate those arguments into this motion as if fully set forth herein.

the Board identified for briefing in this *sua sponte* proceeding. *Cf. Northwest Airlines v. Cnty. of Kent*, 510 U.S. 355, 364 (1994) (observing that a party cannot seek to alter a judgment without first petitioning to do so, while a party may seek to preserve the judgment without cross-petitioning); *Greenlaw v. United States*, 554 U.S. 237, 252 (2008) ("The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality . . . The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal.").

Region 5 incorrectly labels itself the "Appellant" in its latest breif. (*See* Region 5's Response Brief, at p. 1.) Region 5 is not an appellant in this matter. Region 5 did not appeal the ALJ's Initial Decision. The Board should decline to address any issues raised by Region 5 regarding the ALJ's Initial Decision, which Region 5 elected not to appeal in the first instance and that exceed the scope of the Board's directive. For these reasons, Region 5's new assignment of error, asserted for the first time in its Response Brief, should not be considered but stricken from these proceedings.

B. The Blast Furnace Gas Utilization Study Should Be Disregarded and Stricken from These Proceedings.

Region 5 is wrong that the Board may take judicial notice (i.e., official notice) of the blast furnace gas utilization study. "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." 40 C.F.R. 22.22(f). The content of the blast furnace gas utilization study is not such a matter.

The blast furnace gas utilization study appears to indicate how other companies utilized top gases in their respective blast furnaces thirty years ago, and appears to have been provided to

the U.S. EPA by a private entity in approximately 1987. (*See* Region 5's Response Brief, Attachment A.) The subject matter of the study is not within the specialized knowledge and experience of the Board or the U.S. EPA. A review of the study reveals that the U.S. EPA did not prepare it or have it prepared on its behalf. There is no basis to conclude that the parties had routine access to the study or were even aware that it existed. Region 5 acknowledged as much when it indicated in its Opening Brief merely that "information about this document" appeared on the U.S. EPA's website, but not the study itself. (Region 5's Opening Brief, at p. 29, fn. 20.) Indeed, Region 5 felt compelled to attach a copy of the study to its Response Brief, presumably because the study, in fact, is *not* readily accessible.

In addition, regardless of its availability, the study is not a matter that could be judicially noticed by a Federal court. The standard for judicial notice is not simply whether the facts to be noticed are in the "public domain." (*See* Region 5's Opening Brief, at p. 29, fn. 20; Region 5's Response Brief, at p. 7, fn. 7.) Such a standard would be absurdly overbroad and would, for example, include every piece of information on the Internet. To the extent Region 5 meant to say that the study can be noticed because it is a public document (which Respondents dispute), Region 5 is wrong. "[I]n general a court may only take judicial notice of a public record whose existence or contents prove facts whose accuracy cannot reasonably be questioned," and "courts . . . 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." *Passa v. Columbus*, 123 F. App'x 694, 697 (6th Cir. 2005) (collecting cases).

Region 5 is unabashedly attempting to introduce facts set forth in the blast furnace gas utilization study regarding the manner in which a company other than WCI operated its blast furnace to (1) cure the deficiency in its evidence before the ALJ, by (2) proving the truth of the

"facts" set forth in the study, to (3) support an inference that, decades later, WCI operated its blast furnace in the exact same way. The accuracy of those facts can reasonably be questioned—and Respondents do question them—for a variety of reasons that include the lack of relevance the study has to WCI's operations in light of evidence that *is* in the record that shows major renovations to WCI's blast furnace in 2004, including the construction of the circle pipe for the delivery of injectants. (*See* Wosotowsky, P., *Oil Injection at WCI* (Eastern States Blast Furnace and Coke Oven Association, 2006), RX-114; CX-24; RX-114, at p. 02142.)

Moreover, Region 5's failure to authenticate the study and the inability to cross-examine the author of the study preclude its admissibility, whether by judicial notice or otherwise. *See, e.g.*, *United States v. Console*, 13 F.3d 641, 660-61 (3d Cir. 1993) ("[I]n order to be admissible, evidence must be authenticated or identified 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" (quoting Fed. R. Evid. 901(a)); *Passa*, 123 F. App'x at 697 ("[C]ourts . . . 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."); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 564 n.41 (D. Md. 2007) ("A principal reason for excluding hearsay is that the veracity of the declarant cannot be tested by cross-examination.").

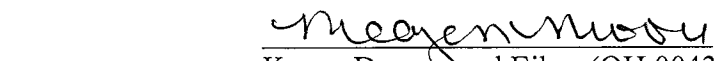
Because the study is not reliable and the facts it contains are disputed, the study should not be judicially or officially noticed. *See, e.g.*, *United States ex rel. Calilung v. Ormat Indus.*, No. 3:14-cv-0325, 2015 U.S. Dist. LEXIS 37874, *22 (D. Nev. 2015) (observing that courts will not take judicial notice of disputed matters). In short, there is no valid basis for Region 5 to ask the Board to take judicial of the blast furnace gas utilization study identified and attached to its briefing. Accordingly, the Board should reject Region 5's request to take judicial notice of it and strike it from these proceedings.

CONCLUSION

It is frankly outrageous for Region 5 to raise assignments of error in this *sua sponte* proceeding that it elected not to appeal in the first instance and that the Board did not direct the parties to address; and to attempt introduce additional evidence that it failed to introduce in the proceedings below and then blame the ALJ for erring because she did not consider it. Region 5 should not be permitted to misdirect the scope of these proceedings and cure the deficiencies in its case with such tactics. Accordingly, Respondents respectfully request that the Board disregard and strike from these proceedings:

1. Region 5's new assignment of error and arguments contained in section D of its Opening Brief and in Section III.A. of its Response Brief, including whether it met its burden of proof that injectants provided substantial, useful heat energy because WCI allegedly used top gases that it allegedly generated as a fuel; and
2. All references to the blast furnace gas utilization study identified in Region 5's Opening Brief and Response Brief, and the purported copy of that study attached to Region 5's Response Brief as Attachment A.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I, Meagan L. Moore, an attorney, hereby certify that on September 18, 2015, the original and one copy of the foregoing Motion to Strike was sent by Federal Express Overnight Delivery to:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
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I further certify that true and accurate service copies of the foregoing Motion to Strike also was sent by Federal Express Overnight Delivery on September 18, 2015, to:

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