

IN RE VEOLIA ES TECHNICAL SOLUTIONS, L.L.C.

CAA Appeal No. 19-01

ORDER DENYING REVIEW

Decided July 21, 2020

Syllabus

The American Bottom Conservancy (“Conservancy”) petitions the Environmental Appeals Board (“Board”) for review of a Title V permit (“2019 Permit”) issued by the U.S. Environmental Protection Agency Region 5 (“Region”) to Veolia ES Technical Solutions, L.L.C. (“Veolia”) under subchapter V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f, and part 71 of title 40 of the Code of Federal Regulations. The 2019 Permit authorizes Veolia to operate its Sauget, Illinois, hazardous waste incinerator (“Facility”). The Region first issued a Title V permit for the Facility in 2008.

In its petition, the Conservancy challenges two aspects of the 2019 Permit. *First*, the Conservancy maintains that the Region clearly erred in omitting a provision from the 2019 Permit that would have required Veolia to implement a twelve-month program to monitor the Facility’s emissions of certain metals from its three combustion units. *Second*, the Conservancy maintains that the Region clearly erred in revising the 2019 Permit’s feedstream analysis requirements to allow Veolia to designate certain feedstreams of waste as “non-suspect” and thereby subject them to less rigorous testing and analysis requirements. Those two aspects of the 2019 Permit represent a change from conditions the Region had proposed in a 2017 permitting decision. The 2017 permitting decision was challenged by Veolia in an administrative appeal, became the subject of a settlement agreement between Veolia and the Region, and was never finalized as proposed.

Held: The Board denies the petition for review on both issues. The Board concludes that the Conservancy has not demonstrated clear error with respect to the Region’s decision not to require Veolia to implement a multi-metals monitoring program. The Board also concludes that the Conservancy has not demonstrated clear error with respect to the Region’s decision to revise the feedstream analysis requirements.

Before Environmental Appeals Judges Aaron P. Avila and Kathie A. Stein.

Opinion of the Board by Judge Avila:

I. STATEMENT OF THE CASE

In June 2019, the U.S. Environmental Protection Agency (“EPA” or “Agency”) Region 5 (“Region”) issued a Clean Air Act Title V operating permit renewal (“2019 Permit”) to Veolia ES Technical Solutions, L.L.C. (“Veolia”), authorizing Veolia to operate its Sauget, Illinois, hazardous waste incinerator (“Facility”). The American Bottom Conservancy (“Conservancy”) timely filed a petition for review (“Petition”) with the Environmental Appeals Board (“Board”) challenging two aspects of the Region’s 2019 permitting decision. *First*, the Conservancy maintains that the Region clearly erred in omitting a provision from the Permit that would have required Veolia to implement a twelve-month program to monitor the Facility’s emissions of certain metals from its three combustion units. *Second*, the Conservancy maintains that the Region clearly erred in revising the Permit’s feedstream analysis requirements to allow Veolia to designate certain feedstreams of waste as “non-suspect” and thereby subject them to less rigorous testing and analysis requirements. Those two aspects of the 2019 Permit represent a change from conditions the Region had proposed in a 2017 permitting decision. As discussed in more detail below, the 2017 permitting decision was challenged by Veolia in an administrative appeal, became the subject of a settlement agreement between Veolia and the Region, and was never finalized as proposed.

For the reasons that follow, the Board concludes that the Conservancy has not demonstrated that the Region’s 2019 permitting decision was clearly erroneous. The Board denies the Petition.

II. LEGAL FRAMEWORK

A. Title V of the Clean Air Act

Under the Clean Air Act (“CAA” or “Act”), major sources of air pollutants and certain other regulated sources must obtain and comply with a Title V permit.¹ CAA § 502(a), 42 U.S.C. § 7661a(a). The Act contemplates that most Title V

¹ For purposes of Title V, “major source” means “any stationary source (or any group of stationary sources located within a contiguous area and under common control)” that is defined as either a “major source” under the hazardous air pollutant provisions of the Act or as a “major stationary source” under either the Act’s general definitions or the provisions pertaining to criteria air pollutants. CAA § 501(2), 42 U.S.C. § 7661(2); *see also* 40 C.F.R. § 71.2 (definition of “major source”).

permits will be issued and administered at the state and local levels but directs EPA to issue federal Title V permits where a state lacks or fails to administer an approved permitting program. *See* CAA § 502(b), (d)(3), 42 U.S.C. § 7661a(b), (d)(3). The regulations for the federal permitting program are set forth at 40 C.F.R. part 71.

In general, Title V does not itself establish substantive emission reduction requirements. That is, Title V contemplates a permit program that incorporates and ensures compliance with substantive emission limitations established under other provisions of the Act, referred to as “applicable requirements,” but that does not independently establish its own emission standards.² *See In re Peabody W. Coal Co.*, 12 E.A.D. 22, 27 (EAB 2005); *see also Ohio Pub. Interest Research Grp., Inc. v. Whitman*, 386 F.3d 792, 794 (6th Cir. 2004) (“Title V does not impose new obligations; rather, it consolidates pre-existing requirements into a single, comprehensive document for each source, which requires monitoring, record-keeping, and reporting of the source’s compliance with the Act.” (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(3), (c)(1))).

A Title V permit must contain “enforceable emission limitations and standards,” compliance schedules, reporting requirements, and “such other conditions as are necessary to assure compliance with applicable requirements.” CAA § 504(a), 42 U.S.C. § 7661c(a). In addition, a Title V permit must include sufficient monitoring requirements to assure compliance with the permit’s terms. CAA § 504(c), 42 U.S.C. § 7661c(c) (“Each permit * * * shall set forth inspection, entry, *monitoring*, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.”) (emphasis added). EPA has established a three-step process for permitting authorities to ensure that federal Title V permits provide for sufficient monitoring. *First*, the permitting authority must incorporate into the permit all monitoring requirements already contained in applicable requirements. 40 C.F.R. § 71.6(a)(3)(i)(A). *Second*, the permitting authority must add periodic monitoring requirements to the permit if the applicable requirements do not already require periodic monitoring. *Id.* § 71.6(a)(3)(i)(B). *Third*, the permitting authority must *supplement* the permit with additional monitoring requirements if the periodic monitoring requirements contained in applicable requirements are not sufficient to assure compliance. *Id.* § 71.6(c)(1).

² Part 71 defines “applicable requirement” to encompass most standards and requirements under the Act, including emission standards for hazardous air pollutants. *See* 40 C.F.R. § 71.2.

A Title V permit is issued for a fixed term not to exceed five years. *Id.* § 71.6(a)(2); *see* CAA § 502(b)(5)(B), 42 U.S.C. § 7661a(b)(5)(B). A permit may be renewed, and renewals are subject to the same procedural requirements that apply to issuance of initial permits, 40 C.F.R. § 71.7(c)(1), including the requirement that the permitting authority issue a statement of basis setting forth the legal and factual basis for a draft permit. *Id.* § 71.7(a)(5).

B. National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors

As relevant here, among the applicable requirements that a Title V permit must incorporate are the emission standards for major sources of hazardous air pollutants that EPA establishes pursuant to section 112(d) of the Act, 42 U.S.C. § 7412(d). *See* CAA § 504(a), 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 71.2, .6(a)(1). The emission standards that apply to hazardous waste incinerators are contained in the National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors (“HWC NESHAPs”), codified at 40 C.F.R. part 63, subpart EEE. *See* National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II), 70 Fed. Reg. 59,402, 59,540-79 (Oct. 12, 2005).³ The HWC NESHAPs include emission standards for mercury, semi-volatile metals (lead and cadmium), and low-volatility metals (arsenic, beryllium, and chromium), with the emission standards for semi-volatile and low-volatility metals applying to the combined emissions of all metals in those two

³ EPA issued the HWC NESHAPs in stages. In 1999, the Agency issued emission standards for Phase I sources (hazardous waste incinerators, hazardous waste cement kilns, and lightweight aggregate kilns). *See* NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 64 Fed. Reg. 52,828, 53,038-077 (Sept. 30, 1999). Those standards were partially vacated by the U.S. Court of Appeals for the District of Columbia Circuit following challenges by both industry and environmental groups. *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001). The Agency replaced the vacated standards incrementally, first issuing interim standards for Phase I sources in 2002, *see* NESHAP: Interim Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Interim Standards Rule), 67 Fed. Reg. 6,792 (Feb. 13, 2002), followed in 2005 by final standards applicable to Phase I sources as well as to Phase II sources (boilers and hydrochloric acid production furnaces), 70 Fed. Reg. 59,402. The final standards took effect in October 2008. 70 Fed. Reg. at 59,412. The interim standards for existing sources are codified at 40 C.F.R. § 63.1203(a), and the final standards for existing sources are codified at 40 C.F.R. § 63.1219(a).

groups.⁴ *See* 40 C.F.R. § 63.1219(a)(2)-(4); NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 64 Fed. Reg. 52,828, 52,845 (Sept. 30, 1999).

Sources regulated under the HWC NESHAPs must document compliance with applicable emission standards by conducting comprehensive performance tests every five years. 40 C.F.R. § 63.1207(b)(1), (d)(1); *see also* 40 C.F.R. § 63.7 (setting forth generally applicable performance testing requirements). Comprehensive performance testing takes place “under operating conditions representative of the extreme range of normal conditions.” *Id.* §§ 63.1206(b)(2), .1207(g). That is, comprehensive performance tests are performed under “worst-case conditions,” and feedstreams can be spiked with metals to ensure that the test will be conducted in a manner that will allow operating parameter limits to be established “to cover all possible normal operating emissions values.” 64 Fed. Reg. at 52,913 & n.184. Each test must include at least three runs, with the arithmetic average of the three runs used to determine whether the source is complying with emission limits. 40 C.F.R. § 63.1206(b)(12).

In addition to demonstrating compliance directly by measuring emissions during comprehensive performance tests, sources must also demonstrate compliance with emission limits indirectly by maintaining compliance with feedrates and limits on other operating parameters that correlate with emission limits. *See* 40 C.F.R. § 63.1207(b); 64 Fed. Reg. at 52,832-33. The purpose of operating parameter limits is to “ensure that the operating conditions (and by correlation the actual emissions) do not exceed performance test levels at any time,” and hence that actual emissions also do not exceed emission limits. 64 Fed. Reg. at 52,833. Although operating parameter limits are generally established based on conditions during the comprehensive performance test, *see, e.g., id.* §§ 63.1209(l) (operating parameter limits for mercury), .1209(n) (operating parameter limits for semi-volatile and low-volatility metals), a permitting authority possesses the discretionary authority to determine, on a case-by-case basis, that alternative

⁴ EPA has explained that setting emission limits based on volatility level is “reasonable” given that emission control strategies are based on volatility. 64 Fed. Reg. at 52,845. Because mercury is highly volatile, it is generally emitted from hazardous waste combustors in the vapor phase, so mercury emissions are typically controlled by injecting a sorbent, such as activated carbon, into the combustion chamber. *Id.* Semi-volatile and low-volatility metals, on the other hand, can be removed as particulate matter. *Id.*

approaches for establishing operating parameter limits “may be necessary.” *Id.* § 63.1209(g)(2).

Feedrate limits for metals are calculated based on the metals content of the feedstream and the rate at which the feedstream enters the combustion unit. *See* 40 C.F.R. §§ 63.1201 (definition of “feedrate operating limits”), .1209(l), (n). To comply with feedrate limits, sources must “obtain an analysis of each feedstream that is sufficient to document compliance with the applicable feedrate limits.” *Id.* § 63.1209(c)(1). Each source must develop and implement a feedstream analysis plan that specifies, among other things, the parameters for which each feedstream will be analyzed, the frequency of analysis and whether the analysis will be performed by sampling or other methods (such as by relying on information obtained from other sources, including published information), and the sampling and testing methods to be used. *See id.* § 63.1209(c)(2).

III. PROCEDURAL AND FACTUAL HISTORY

A. The Facility

The Veolia Facility is a commercial hazardous waste incinerator located in Sauget, Illinois. Region 5, U.S. EPA, *Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10*, at 8 (June 17, 2019) (A.R. 0644) (“2019 Permit”); Region 5, U.S. EPA, *Statement of Basis for Draft Significant Modification to Air Pollution Control Title V Permit No. V-IL-1716300103-2014-10*, at 3 (July 2018) (A.R. 0287) (“2018 Statement of Basis”).⁵ The population living within three miles of the Facility is two-thirds minority, with one third of the population living below the federal poverty level. Region 5, U.S. EPA, *Statement of Basis for Draft Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10*, at 7, 75-77 (Oct. 10, 2014) (A.R. 0004) (“2014 Statement of Basis”). EPA considers the local community to be an overburdened one that is subject to environmental justice concerns. *Id.* at 75-77.

⁵ Most of the documents listed in the Region’s certified index of the administrative record are available at www.regulations.gov under the prefix “EPA-R05-OAR-2014-0280” followed by a unique four-digit identification number. For example, the 2019 Permit is identified as “EPA-R05-OAR-2014-0280-0644.” In this Order, we cite to documents in the administrative record using “A.R.” followed by the four-digit identifier.

The Facility includes three combustion units, Units #2, #3, and #4.⁶ *See* 2019 Permit § 1.3, at 8-9; 2018 Statement of Basis at 3. Units #2 and #3 are fixed-hearth, dual chamber incinerators, each with a maximum heat capacity of 16 million British thermal units per hour.⁷ 2019 Permit § 1.3, at 8; 2018 Statement of Basis at 3. Unit #4 is a rotary kiln unit with a maximum heat capacity of 50 million British thermal units per hour. 2019 Permit § 1.3, at 9; 2018 Statement of Basis at 3. Veolia has used an activated carbon injection system to control the emission of vapor phase mercury from Unit #4 since at least 2008. *See* Region 5, U.S. EPA, *Statement of Basis Title V Permit to Operate No. V-IL-1716300103-08-01*, at 4 (Sept. 12, 2008) (A.R. 0263) (“2008 Statement of Basis”). Veolia added activated carbon injection systems to control mercury emissions from Units #2 and #3 in June 2018. *See* 2018 Statement of Basis at 8.

Veolia is required to obtain and operate in compliance with a Title V permit because the Facility is a major source of hazardous air pollutants and because it is subject to the HWC NESHAPs. *Id.* at 3; *see* CAA § 502(a), 42 U.S.C. § 7661a(a); 40 C.F.R. § 71.3(a). The Region assumed permitting authority for the Facility after the State of Illinois did not issue Veolia a Title V permit on a timely basis. *See* 2014 Statement of Basis at 25.

In accordance with requirements in the HWC NESHAPs, Veolia has conducted at least three complete rounds of comprehensive performance testing at the Facility: in 2008, 2013, and 2018. *See generally* ENSR Corp., *Metals Performance Test Report Prepared for the for Fixed Hearth Incinerator Number 2* (Oct. 2008) (A.R. 0253) (“Unit #2 2008 Comprehensive Performance Test Report”); ENSR Corp., *Metals Performance Test Report Prepared for the Fixed Hearth Incinerator Number 3* (Oct. 2008) (A.R. 0254) (“Unit #3 2008 Comprehensive Performance Test Report”); ENSR Corp., *Metals Performance Test Report Prepared for the Rotary Kiln Incinerator Number 4* (Oct. 2008) (A.R. 0255) (“Unit #4 2008 Comprehensive Performance Test Report”); URS Corp., *Comprehensive Performance Test Report* (Jan. 28, 2014) (A.R. 0005) (“2013 Comprehensive Performance Test Report”); AECOM, *Comprehensive Performance Test Report* (Jan. 23, 2019) (A.R. 0643) (“2018 Comprehensive

⁶ Unit #1 was decommissioned and closed in 1992. 2018 Statement of Basis at 3 n.1.

⁷ Although Units #2 and #3 are similar in design, they have different baghouse configurations and Unit #2 burns gaseous, solid, and liquid wastes, whereas Unit #3 burns only solid and liquid wastes. 2018 Statement of Basis at 3 & n.2.

Performance Test Report”). In addition, Veolia conducted a comprehensive performance test of Unit #3 in May 2006 and limited retests of Unit #3 in June 2006 and Unit #2 in September 2008. *See generally* ENSR Corp., *Evaluation of Metals, Particulate Matter and PCDD/PCDF Emissions for Fixed Hearth Incinerator Unit 3* (Sept. 2006) (A.R. 0252) (“2006 Comprehensive Performance Test Report”); Unit #2 2008 Comprehensive Performance Test Report. While the Region included the results of the 2018 comprehensive performance test in the administrative record for this matter, the Region did not rely on the 2018 data when preparing the 2019 Permit because it had not yet had time to complete its review of the results. Region 5, U.S. EPA, *Response to Comments on EPA’s Proposed Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10*, at 42 (June 2019) (A.R. 0645) (“2019 Resp. to Cmts.”); Oral Argument Transcript 46-48 (Apr. 14, 2020) (“Oral Arg. Tr.”).

B. 2008 Permit

The Region first issued a Title V permit for the Facility in September 2008. *See* Region 5, U.S. EPA, *Title V Permit No. V-IL-1716300103-08-01* (Sept. 12, 2008) (A.R. 0262) (“2008 Permit”). That permit contained the interim and final emission standards for mercury, semi-volatile metals, and low-volatility metals established in the HWC NESHAPs, but it did not include feedrate limits for those metals. The Region explained that it did not include feedrate limits in the 2008 Permit, either because Veolia had failed to propose those limits or because the Region had been unable to validate the data Veolia relied upon for proposing those limits. *See* 2008 Statement of Basis at 8. Instead, the Region required Veolia to develop operating parameter limits, including feedrate limits for metals, based on operations during a comprehensive performance test. *See* 2008 Permit § 2.1(D)(4)(m), (o); *see also id.* § 2.1(C)(5)(b) (Documentation of Compliance). Veolia represents that it is now operating in accordance with feedrate limits that are based on the Facility’s most recent comprehensive performance test data. Veolia ES Technical Solutions, L.L.C.’s Amended Response to Petition for Review 7 (Dec. 17, 2019) (“Veolia’s Resp. Br.”). At oral argument, Veolia stated that the Facility’s current feedrate limits are based on conditions during the 2018 comprehensive performance testing. Oral Arg. Tr. at 62-63; *see* 2008 Permit § 2.1(A)(7), at 9, (C)(2), at 13.

The 2008 Permit was due to expire in October 2013, but Veolia submitted an application for renewal that the Region determined to be timely and complete, thus authorizing Veolia to continue operating under the terms of the 2008 Permit until a new permit took effect. *See* 2014 Statement of Basis at 12-14; 40 C.F.R. § 71.5(a)(2). As required by the 2008 Permit, Veolia submitted an application for

significant modification that would have added feedrate limits to the 2008 Permit based on the results of performance testing conducted in August and September 2008. The Region decided to deny that application and, instead, announced plans to reopen the permit to incorporate not only proposed feedrate limits but also additional monitoring requirements. 2014 Statement of Basis at 26-27. The Region subsequently changed course and did not reopen the permit but, instead, moved forward with permit renewal pursuant to 40 C.F.R. § 71.7(c). 2014 Statement of Basis at 27.

C. 2017 Permitting Decision

In January 2017, the Region issued a permitting decision, accompanied by a Response to Comments document, that would have renewed the 2008 Permit with revised conditions, two of which are relevant here. *See* Region 5, U.S. EPA, *Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10* (Jan. 18, 2017) (A.R. 0273) (“2017 Permitting Decision”); Region 5, U.S. EPA, *Response to Comments on EPA’s Proposed Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10* (Jan. 18, 2017) (A.R. 0274) (“2017 Resp. to Cmts.”). *First*, the 2017 Permitting Decision would have required Veolia to implement a multi-metals monitoring program, including the installation of monitoring devices on all three of the Facility’s combustion units to measure the air emissions of mercury, semi-volatile metals, and low-volatility metals for at least twelve months.⁸ 2017 Permitting Decision § 2.1(D)(1)(i), at 34-39. *Second*, it would have required Veolia to implement enhanced procedures for analyzing feedstreams. *Id.* § 2.1(D)(4), at 42-64.

In February 2017, Veolia filed a petition for review with the Board challenging the multi-metals monitoring and feedstream analysis requirements. *See* Petition, *In re Veolia ES Technical Solutions, L.L.C.*, CAA Appeal No. 17-02 (filed Feb. 15, 2017) (A.R. 0280). Shortly thereafter, the Region and Veolia agreed to participate in the Board’s alternative dispute resolution (“ADR”) program, and the

⁸ The 2017 Permitting Decision would have required Veolia to “install, calibrate, maintain and operate multi-metals monitoring devices on Units #2, #3, and #4 within 12 months (365 days) after [the] permit becomes effective” and to operate the devices “at all times” for at least twelve calendar months. 2017 Permitting Decision § 2.1(D)(1)(i), at 34, & (D)(1)(i)(iv), at 35-36. Among other things, Veolia would have been required to report any emissions that occurred outside of a designated range during the monitoring program and to take corrective action to reduce metal emissions if problems were to occur. *Id.* § 2.1(D)(1)(i)(iii), at 35, (D)(1)(i)(xi), at 37.

Board issued an order staying proceedings on Veolia's petition to allow the ADR process to proceed. *See In re Veolia ES Tech. Sols., L.L.C.*, CAA Appeal No. 17-02 (EAB Mar. 15, 2017) (Order Staying Proceedings to Allow Parties to Participate in ADR). The Conservancy requested permission to participate in the ADR program, *see Interested Party American Bottom Conservancy's Request for Permission to Participate in Upcoming Mediation, In re Veolia ES Tech. Sols., L.L.C.*, CAA Appeal No. 17-02 (filed Apr. 4, 2017), but the Settlement Judge assigned to the matter advised that it would be premature for the Board to consider the Conservancy's request at that time given that an initial status conference with the parties had not yet occurred. *See In re Veolia ES Tech. Sols., L.L.C.*, CAA Appeal No. 17-02 (EAB Apr. 10, 2017) (Notice to Petitioner, EPA Region V, and American Bottom Conservancy Regarding the Conservancy's Request to Participate in ADR). The Region and Veolia subsequently informed the Settlement Judge that they had decided to pursue private settlement discussions outside the Board's ADR program, so the Board removed the matter from the ADR program, returned it to the active docket, and denied the Conservancy's request to participate in the ADR process as moot. *See In re Veolia ES Tech. Sols., L.L.C.*, CAA Appeal No. 17-02 (EAB May 5, 2017) (Order Removing Matter from ADR Program and Denying American Bottom Conservancy's Request to Participate in ADR as Moot).

In October 2017, negotiations between Veolia and the Region culminated in a contingent settlement agreement in which, if finalized following an opportunity for notice and comment, Veolia agreed to add activated carbon injection systems to control mercury emissions from Units #2 and #3 (Unit #4 already had such a system in place) and the Region agreed to request a voluntary remand of the 2017 Permitting Decision in order to propose specified revisions to the draft renewal permit.⁹ *See Settlement Agreement 3-4 & attach. A* (Oct. 23, 2017) (A.R. 0277) ("Settlement Agreement"). Specifically, the Region agreed to revise the draft renewal permit to omit the requirement that Veolia implement a temporary, multi-metals monitoring program and to allow Veolia to categorize certain wastes as "non-suspect," thereby relaxing the feedstream analysis procedures for those wastes compared to the procedures for "suspect wastes." *See id.* attach. A. Under the terms of the Settlement Agreement, the Region retained

⁹ The Conservancy had requested to participate in the private settlement discussions between the parties, but the Region declined the request. *See Pet. ex. 3* (Letter from Catherine Garypie, Assoc. Gen. Counsel, Region 5, U.S. EPA, to Elizabeth J. Hubertz, Ass't Dir., Interdisc. Env'tl. Clinic, Wash. Univ. School of Law (July 11, 2017)).

the right to make changes to the draft renewal permit based on public notice, comment, or other information contained in the permit record. *Id.* at 7. Veolia agreed not to challenge the final renewal permit so long as it did not depart from the draft renewal permit. *Id.* at 4-5.

The Region published notice of the Settlement Agreement and accepted public comment on the Settlement Agreement for a period of thirty days. *See* Proposed Settlement Agreement, Clean Air Act Title V Permit Appeal, 82 Fed. Reg. 52,901 (Nov. 15, 2017) (A.R. 0279). The Conservancy, among others, submitted comments opposing the terms of the proposed revisions to the draft renewal permit. *See* Letter from Elizabeth J. Hubertz, Ass't Dir., Interdisc. Env'tl. Law Clinic, Wash. Univ. School of Law, to John T. Krallman, Office of Gen. Counsel, U.S. EPA (Dec. 15, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OGC-2017-0630-0006>.

After the public comment period on the Settlement Agreement had closed, EPA decided not to withhold or withdraw consent from the Settlement Agreement, and in March 2018 the Region and Veolia filed a motion with the Board requesting voluntary dismissal of Veolia's petition and remand of the 2017 Permitting Decision. Joint Status Report, Unopposed Motion for Voluntary Remand, and Joint Motion to Dismiss Without Prejudice if Voluntary Remand is Granted, *In re Veolia ES Technical Solutions, L.L.C.*, CAA Appeal No. 17-02 (filed Mar. 28, 2018). The Board issued an Order granting the joint motion and remanding the 2017 Permitting Decision to the Region. *In re Veolia ES Tech. Sols., LLC*, CAA Appeal No. 17-02 (EAB Apr. 3, 2018) (Order Granting Unopposed Motion for Voluntary Remand and Dismissing Petition for Review). In so doing, the Board did not review the merits of the Settlement Agreement and specifically noted that "any permit action the Region takes on remand must be done in accordance with, and is subject to, applicable permitting regulations." *Id.* at 2. In the Order, the Board also provided that an appeal to the Board of the Region's decision on remand would be required to exhaust administrative remedies. *Id.*

D. 2019 Permit

On remand, the Region issued a new draft renewal permit in July 2018. Region 5, U.S. EPA, *Draft Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10* (July 2018) (A.R. 0286). The Region accepted written comments on the new draft from July 13, 2018, through November 5, 2018, and held a public hearing in St. Louis, Illinois, on August 21, 2018. 2019 Resp. to Cmts. at 1. The Conservancy and Veolia (among others) submitted written comments on the draft. *See* Letter from Elizabeth J. Hubertz, Counsel, Am. Bottom Conservancy, to Edward Nam, Dir. Air & Rad. Div., Region 5, U.S. EPA (Nov. 5,

2018) (A.R. 0459); Letter from Doug Harris, Gen. Mgr., Veolia ES Tech. Sols., L.L.C., to David Ogulei, Region 5, U.S. EPA (Nov. 5, 2018) (attaching comments) (A.R. 0457). Following the close of the public comment period, the Region considered the comments submitted and ultimately issued the 2019 Permit in June 2019, accompanied by a Response to Comments document.

The 2019 Permit does not require a multi-metals monitoring program. It also includes revisions to the requirements for feedstream analysis procedures, allowing Veolia to designate certain wastes as “non-suspect,” thereby subjecting them to less rigorous testing and analysis requirements than those for “suspect” wastes. 2019 Permit § 2.1(D)(4), at 42-64. The 2019 Permit is identical to the July 2018 draft renewal permit in all material respects.

E. *Petition for Review*

In July 2019, the Conservancy timely filed a Petition for Review with the Board pursuant to 40 C.F.R. § 71.11(*l*) challenging, as clearly erroneous, the Region’s decisions not to require a multi-metals monitoring program and to revise the feedstream analysis requirements to allow for the designation of “non-suspect” waste. American Bottom Conservancy Petition for Review of a Clean Air Act Part 71 Permit to Operate 14 (July 17, 2019) (“Pet.”). Veolia filed a motion to intervene, which the Board granted. Order Granting Intervention, Establishing Briefing Schedule, and Specifying Filing Procedures (issued July 26, 2019). Shortly after the Petition was filed, the Conservancy, the Region, and Veolia requested that the matter be stayed in order to allow the parties to participate in the Board’s ADR program. Region’s Motion to Hold Briefing Schedule in Abeyance (filed Aug. 21, 2019). However, based on information that came to light early in the process, it was determined that the case was not appropriate for ADR, and the Board returned the appeal to the active docket and lifted the stay in October 2019. Order Returning Matter to the Regular Docket, Lifting Stay, and Establishing a Briefing Schedule (issued Oct. 17, 2019). Following return of the matter to the active docket, and at the request of the parties, the Board granted three requests for extensions of time, and briefing was completed in December 2019.¹⁰ See EAB Index of Filings, *In re Veolia ES Tech. Sols., L.L.C.*, Appeal No. CAA 19-01, Entry

¹⁰ EPA’s Office of General Counsel was listed as counsel on the Region’s response brief and presented oral argument on behalf of the Region in this matter.

Nos. 11-23, www.epa.gov/eab (available under “EAB Dockets”). Oral argument was conducted in April 2020.¹¹

IV. PRINCIPLES GOVERNING BOARD REVIEW

The Board’s review of a federal Title V permit is governed by part 71, which assigns to petitioner the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 71.11(*I*)(1). Ordinarily, the Board will deny a petition for review and thus not remand the permit unless the underlying permit decision either is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review. *Id.*; *see* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (preamble to rulemaking that revised procedures for Board’s review of permit appeals under 40 C.F.R. part 124, which parallel part 71 procedures); *see also In re Peabody W. Coal Co.*, 12 E.A.D. 22, 32-34 & n.26 (EAB 2005) (discussing and applying part 124 standard of review to part 71 proceeding). The Board grants review “only sparingly,” and “most permit conditions should be finally determined at the [permit issuer’s] level.” 45 Fed. Reg. at 33,412; *see In re Peabody W. Coal Co.*, 15 E.A.D. 757, 763 (EAB 2013).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised “considered judgment” in issuing the permit. *See In re Evoqua Water Techs. L.L.C.*, 17 E.A.D. 795, 799 (EAB 2019); *In re Gen. Elec. Co.*, 17 E.A.D. 434, 559-69 (EAB 2018). “The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion.” *Gen. Elec.*, 17 E.A.D. at 560; *see also In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417 (EAB 1997). The record as a whole must demonstrate that the permit issuer “duly

¹¹ The Board held oral argument by videoconference. Argument had originally been scheduled to take place in the EPA administrative courtroom on March 5, 2020. Veolia, however, filed an unopposed motion to move the oral argument date to on or after April 1, 2020. The Board granted Veolia’s unopposed motion and rescheduled oral argument in this matter for April 1, 2020. *See* Order Scheduling Oral Argument (issued Jan. 17, 2020); Order Rescheduling Oral Argument for April 1, 2020 (issued Jan. 22, 2020). Then, in light of guidance received at that time from the federal government related to COVID-19, the Board cancelled the April 1 in-person argument and, instead, held oral argument via videoconference on April 14, 2020. Order Vacating Oral Argument Scheduled for April 1, 2020, and Notifying the Parties of Electronic Service (issued Mar. 18, 2020); Order Rescheduling Oral Argument for April 14, 2020 (issued Mar. 30, 2020).

considered the issues raised in the comments” and ultimately adopted an approach that “is rational in light of all information in the record.”¹² *In re Gov’t of D.C. Mun. Sep. Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re West Bay Expl. Co.*, 17 E.A.D. 204, 222-23, 225 (EAB 2016); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), *pet. for review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

On matters that are fundamentally technical in nature, the Board typically defers to a permit issuer’s technical expertise and experience, provided that the permit issuer has adequately set forth and supported its reasoning in the administrative record. *See Evoqua*, 17 E.A.D. at 828-29; *Peabody*, 12 E.A.D. at 33-34. Clear error is not established simply because a petitioner presents a difference of opinion on a technical matter. *Evoqua*, 17 E.A.D. at 829.

V. ANALYSIS

A. Application in This Case of the “Reasoned Explanation” in *FCC v. Fox Television Stations Would Not Materially Differ from Examination of the Record Required by the Board’s Clear Error Standard of Review*

We begin by addressing a dispute as to our standard of review. The Conservancy maintains that the principles for judicial review of final agency action articulated in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), apply in this proceeding. Pet. at 14, 31-32. The Region argues, and Veolia concurs, that *Fox* does not apply here. EPA Region 5 Response to the American Bottom Conservancy Petition for Review 17-18 (Dec. 9, 2019) (“Region’s Resp. Br.”); Veolia’s Resp. Br. at 44-47.

¹² In a footnote in its response brief, the Region asserts, “Under the ‘clearly erroneous’ standard, the Board must accept Region 5’s findings of fact unless the Board is *definitely and firmly convinced* that *a mistake has been made*. In other words, it is not enough that the Board may have weighed the evidence and reached a different conclusion. Region 5’s decision will only be reversed if it is *implausible* in light of all the evidence.” EPA Region 5 Response to American Bottom Conservancy Petition for Review 10-11 n.2 (Dec. 9, 2019) (“Region’s Resp. Br.”) (emphasis added). The only support that the Region supplies for its novel assertion is the Board’s decision in *General Electric*, referencing the Board’s exercise of “considered judgment” in the context of the Board’s review of the administrative record for clear error. *Id.* (citing *Gen. Elec.*, 17 E.A.D. at 445). Neither *General Electric* nor the Board’s long-applied considered judgment standard stands for the proposition asserted by the Region. Elsewhere in its response brief, the Region articulates the Board’s standard of review correctly. *See, e.g.*, Region’s Resp. Br. at 10.

Under the circumstances of this case, we conclude that the application of *Fox* would not differ in any material respect from application of the clear error standard of review provided by the governing regulations at 40 C.F.R. sections 124.19(a) and 71.11(l)(1) that the Board applies consistently in permit appeals. According to the Conservancy, *Fox* requires an agency to provide “a reasoned explanation” for disregarding facts and circumstances that underlie a prior policy. Pet. at 14 (quoting *Fox*, 556 U.S. at 515-16); see also *id.* at 31. As to the arguments raised in this matter, we do not see how the “reasoned explanation” required by *Fox* differs materially from the examination of the record called for by the Board’s clear error standard of review. In applying the clear error standard of review, the Board evaluates the administrative record to determine whether the permit issuer exercised considered judgment in rendering its decision, and the Board considers the parties’ arguments with respect to the administrative record *as a whole*, including factual findings, to determine whether the permit issuer provided a cogent explanation for its permitting decision. See, e.g., *In re Evoqua Water Techs. L.L.C.*, 17 E.A.D. 795, 839-41 (EAB 2019) (remanding permit, in part, where Region failed to explain why it had added substantive change to final permit); *Gen. Elec.*, 17 E.A.D. at 567-69 (remanding permit, in part, where “the Region did not reconcile seemingly inconsistent statements on the protectiveness of on-site disposal in the Statement of Basis and Response to Comments” and failed to explain why waiver of relevant regulatory requirements would be inappropriate); *In re Town of Concord*, 16 E.A.D. 514, 523-24 (EAB 2014) (remanding permit where Board was unable to determine if change reflected Region’s considered judgment); *In re City of Marlborough*, 12 E.A.D. 235, 244-45 (EAB 2005) (same); see also *In re Port Auth. of N.Y. & N.J.*, 10 E.A.D. 61, 91 (EAB 2001) (finding lack of considered judgment in Coast Guard’s amendment of unilateral administrative order and citing *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), for proposition that an agency must examine relevant data and articulate satisfactory explanation for its action, including rational connection between facts found and choice made). A permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching that conclusion. Under neither *Fox* nor the Board’s clear error standard of review is the Region free to disregard, without explanation, inconsistencies raised by petitioners in the facts or determinations in the permitting record. See *Evoqua*, 17 E.A.D. at 799; *Gen. Elec.*, 17 E.A.D. at 559-69. And, as we discuss below in Part V.B, the permitting record in this matter includes documents and determinations related to the 2017 Permitting Decision. Finally, at oral argument, counsel for the Conservancy appeared to agree

that application of *Fox*'s "reasoned explanation" approach in this matter would not result in a different outcome.¹³ *See* Oral Arg. Tr. at 11.

B. *Multi-Metals Monitoring*

A Title V permit must require sufficient monitoring to assure compliance with its terms and conditions. CAA § 505(c), 42 U.S.C. § 7661c(c). In the 2017 Permitting Decision, the Region determined that a supplemental, multi-metals monitoring program—beyond the monitoring that is otherwise required under the HWC NESHAPs—was necessary to assess whether the Facility's operating parameter limits, including its feedrate limits for metals, were adequate to assure compliance with emission limits. 2017 Resp. to Cmts. at 85-86. After Veolia agreed to install additional activated carbon injection equipment to control mercury emissions from Units #2 and #3, the Region reevaluated the technical bases it had previously relied upon to support its decision to require Veolia to implement the supplemental monitoring program and concluded that those bases did not support the need to monitor semi-volatile and low-volatility metals alone. 2019 Resp. to Cmts. at 30. Specifically, the Region explained that the technical data that the Region had previously used to support the need for the supplemental multi-metals program "related primarily to mercury" and that the two data points showing high levels of semi-volatile or low-volatility metals emissions "involved anomalous results." *Id.* According to the Region, "these anomalous single data points were not enough to support a conclusion that multi-metals monitoring devices were necessary." *Id.*

The Conservancy contends that the Region's decision not to require the monitoring program was clearly erroneous, maintaining that the Permit will fail to ensure compliance without it. Pet. at 14, 26-32; *see also* American Bottom Conservancy's Reply to EPA Region 5's and Veolia's Responses to Its Petition for Review 4-12 (Dec. 31, 2019) ("Reply Br."). The Conservancy challenges the Region's decision only as it pertains to monitoring for semi-volatile and low-

¹³ When asked at oral argument why the Board should not simply apply its clearly erroneous standard of review, which encompasses a considered judgement inquiry, counsel for the Conservancy answered, "I'm not sure it will make that much of a difference. What I called the *Fox* Doctrine starts in *State Farm*, which has the same sort of considered judgment and clearly erroneous rulings for arbitrary and capricious. Really, the *Fox* line of cases stands for the idea that when you're reviewing a change in position as opposed to an initial position, the reasons for the change have to make sense, as well." Oral Arg. Tr. at 11.

volatility metals (not mercury) and acknowledges that Veolia's recent installation of activated carbon injection equipment at Units #2 and #3 will likely control mercury emissions from the Facility. Pet. at 17-18. But the Conservancy points out that the activated carbon injection equipment will not eliminate the Facility's emissions of semi-volatile and low-volatility metals and argues that the Region's decision not to require monitoring for those metals was not reasonable. Pet. at 17-18; Reply Br. at 4-5. Given the Region's conclusion in the 2017 Permitting Decision that a multi-metals monitoring program was necessary to assure compliance, the Conservancy maintains that the Region has not adequately explained why the technical bases that it relied upon for that determination no longer hold. See Pet. at 17-18, 26-32; Reply Br. at 4-12. The Conservancy contends that the Region's position in the 2019 Permit that supplemental monitoring is not necessary constitutes "a complete about-face" and that the Region has not adequately explained the basis for that change. Pet. at 6; see also *id.* at 15-18.

In its response brief, the Region argues that the question as to what level of monitoring is necessary to assure compliance is a technical one and that the Board should defer to the Region's scientific and technical expertise. Region's Resp. Br. at 13. The Region also contends that it is not required to explain why it changed the monitoring provisions contained in the 2019 Permit from those that were proposed in the 2017 Permitting Decision and that it is required only to explain why the terms of the 2019 Permit satisfy the statutory requirements for monitoring imposed under 42 U.S.C. § 7661c(c). *Id.* at 15. Finally, the Region maintains that it did not clearly err by determining that supplemental monitoring is no longer necessary and that it adequately explained, in the record, its basis for reaching that conclusion. *Id.* at 21.

We first address the parties' arguments about the scope of the Board's inquiry. In order to determine, as the Region urges, whether it clearly erred in determining that the 2019 Permit—as a whole—assures compliance with the permit's terms and conditions, the Board examines, as noted above, whether the permit issuer adopted an approach that is "rational in light of *all* information in the record." *In re Gov't of D.C. Mun. Sep. Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002) (emphasis added); accord *In re Gen. Elec. Co.*, 17 E.A.D. 434, 561 (EAB 2018); *In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001). Here, the administrative record for the 2019 Permit includes most, if not all, of the documents that the Region relied upon when issuing its 2017 Permitting Decision, including the Region's 2014 Statement of Basis and 2017 Response to Comments documents. See EAB Index of Filings, *In re Veolia ES Tech. Sols., L.L.C.*, Appeal No. CAA 19-01, Entry No. 18, www.epa.gov/eab (available under "EAB Dockets")

(Certified Index of the Administrative Record for Permit No. V-IL-1716300103). Thus, our analysis entails examining whether the Conservancy has established in its Petition that the administrative record for the 2019 Permit, including documents and determinations related to the 2017 Permitting Decision, demonstrates clear error by the Region. We therefore reject the Region's argument that we should not examine the reasons why it determined to change course in the 2019 Permit from the determination it made in connection with the 2017 Permitting Decision.¹⁴

We nevertheless undertake this examination mindful that the question as to what level of monitoring is necessary is inherently a technical one. The Board typically defers to a permit issuer on technical matters as long as the permit issuer has adequately set forth its reasoning, with support, in the administrative record. *See Evoqua*, 17 E.A.D. at 828-29; *Gen. Elec.*, 17 E.A.D. at 514-15; *In re ESSROC Cement Corp.*, 16 E.A.D. 433, 457 (EAB 2014); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 40-41 (EAB 2005). As discussed below, we conclude that the Conservancy has not demonstrated that the Region clearly erred by deciding not to require a multi-metals monitoring program.

1. *The Region's Basis in the 2017 Permitting Decision for Requiring a Multi-Metals Monitoring Program*

In 2017, the Region stated that the purpose of the proposed multi-metals monitoring program was "to establish limits on operating parameters to control the emission of metals from the Permittee's facility." 2017 Permitting Decision § 2.1(D)(1)(i), at 34. At that time, the Region explained that the program was necessary to establish "a better correlation between the inlet and outlet concentrations of metals" in the combustion units and to determine whether the operating parameter limits established in the permit were "adequate to assure continuous compliance" with the emission limits. 2017 Resp. to Cmts. at 13, 86; *see also* 2014 Statement of Basis at 57 ("[The Region] is proposing the temporary use of the multi-metals [monitoring] to provide data that will allow verification that the OPLs [operating parameter limits] in the permit will assure compliance with the emission limits."). In the record, the Region attributed its decision to require the program primarily to its concern about two aspects of the Facility's operations in particular, both of which involve variability.

¹⁴ We note that, notwithstanding the Region's argument on this point, its response brief does undertake to provide an explanation based on the administrative record for the change in course. Region's Resp. Br. at 15-23.

First, the Region identified *variability in emissions* among the Facility's three combustion units as a critical factor in deciding to require the monitoring program. *See* 2014 Statement of Basis at 52-56; 2017 Resp. to Cmts. at 14-16. The Region noted that during the 2013 comprehensive performance test, emission levels from the three combustion units were "significantly different" even though the wastes fed to each unit were "similar." 2014 Statement of Basis at 52-53; *see also* 2017 Resp. to Cmts. at 15-18 (summarizing historical results of emissions tests for metals). The Region expressed concern that "even when Veolia purports to know the concentrations of mercury, SVM [semi-volatile metals], and LVM [low-volatility metals] being fed into its incinerators, emissions from those incinerators vary." 2017 Resp. to Cmts. at 15. The Region identified a number of factors that might have contributed to the variability in emissions, including possible interference by other substances in the feedstreams, sampling or testing errors, and differences in incinerator operating conditions (such as residence time or burn temperature). 2014 Statement of Basis at 58; *see also* 2017 Resp. to Cmts. at 16. Nevertheless, the Region pointed to the variability as evidence that a linear relationship may not exist between inputs to and outputs from the combustion units. 2014 Statement of Basis at 53; *see also* 2017 Resp. to Cmts. at 17 ("EPA does not believe that a reliable feedrate-emissions relationship can be readily ascertained from the available historical emissions and feedrate data for SVM [semi-volatile metals] and LVM [low-volatility metals from [Units #2 and #3]]."). The Region noted that the variation was particularly evident with respect to mercury emissions, pointing out that during the 2013 comprehensive performance test, mercury emissions from Unit #2 were at least fifty percent higher than from Unit 3 despite "nearly identical mercury feedrates," but observing that variations in performance by the combustion units also existed with respect to emissions of semi-volatile and low-volatility metals, albeit to a lesser extent. 2014 Statement of Basis at 58 (citing tbl.9).

Second, the Region identified *variability in the content of feedstreams*, including both the variety of types of wastes received by the Facility as well as heterogeneity within individual feedstreams. *See* 2014 Statement of Basis at 50; 2017 Resp. to Cmts. at 51-52. The Region observed that because the Facility's feedstream "constantly changes," its operators must continuously adjust the combustion units' operating parameters (including "temperature, pressure, and residence time") to insure optimal combustion. 2017 Resp. to Cmts. at 51. The Region also observed that based on the variability in the content of feedstreams, there is a "great likelihood" that emissions from the Facility could exceed emission limits for mercury and other metals. *Id.* at 52. The Region indicated that relying on a single comprehensive performance test to establish adequate operating parameter limits is difficult where the feedstream varies on a "minute by minute"

basis. *Id.* at 51. In addition, the Region expressed concern that the variability within and among Veolia’s feedstreams complicates the task of determining what conditions represent “the extreme range of normal,” making it difficult to ensure that emissions during the comprehensive performance test represent the “worst case” scenario. *Id.* at 69; *see* 40 C.F.R. § 63.1206(b)(2).

In addition, the Region stated that it considered four additional site-specific factors to determine whether additional monitoring was necessary to assure compliance:

- A site-specific dispersion modeling and risk assessment, conducted by the Agency for purposes of permitting under the Resource Conservation and Recovery Act (“RCRA”) that showed mercury emissions from the Facility could deposit in and near local lakes;¹⁵
- An April 13, 2009, ambient air measurement of a potentially dangerous level of arsenic by a monitor located less than two miles northeast of the Facility;
- A 2002 joint study conducted by two academic institutions and the U.S. Geological Survey identifying the Facility and a now-defunct metal recycler as primary contributors to mercury concentrations in the study area; and
- The Facility’s location in an area with environmental justice concerns, including disproportionate adverse environmental impacts and a population with a significant number of minority and low-income community members.

See 2017 Resp. to Cmts. at 24-25; *see also id.* at 26-37 tbl.1 (summarizing site-specific facts evaluated by Region). The Region noted that its review of these site-

¹⁵ While it is not in the record for this matter, the Agency also prepared a site-specific risk assessment for human health from hazardous waste combustion at the Veolia facility on September 30, 2019. *See* Christopher A. Lambesis & Todd D. Ramaly, Region 5, U.S. EPA, *Site-Specific Risk Assessment for Human Health from Hazardous Waste Combustion: Veolia ES Technical Solutions, L.L.C., Sauget, Illinois* (Sept. 30, 2019), <https://www.epa.gov/caa-permitting/veolia-sauget-site-specific-risk-assessment>. When asked at oral argument about the intersection between the Facility’s Title V permit and its state-issued RCRA permit, counsel for the Region explained that the Facility is subject to overlapping but independent Title V and RCRA permitting requirements and that the updated risk assessment has no bearing on the Title V permit. *See* Oral Arg. Tr. at 48-51.

specific factors “lends further support for the determination that additional monitoring is necessary to document that compliance with the OPLs [operating parameter limits] will result in continuous compliance with the emission limits in the HWC NESHAP.” *Id.* at 25. Thus, it was against the backdrop of that constellation of considerations that the Region included the multi-metals monitoring program in the 2017 Permitting Decision.

2. *The Conservancy Has Not Demonstrated That the Region Clearly Erred by Deciding Not to Require a Multi-Metals Monitoring Program*

In 2019, the Region decided *not* to require a multi-metals monitoring program in the Permit, attributing the decision to Veolia’s installation of mercury-control equipment on Units #2 and #3 and the Region’s reevaluation of technical bases it had earlier relied upon to require the monitoring program. *See* 2018 Statement of Basis at 8-9; 2019 Resp. to Cmts. at 29. The Region stated that the changes made between the 2017 Permitting Decision and the 2019 Permit were “appropriate and will ensure that the issued permit continues to comply with the CAA’s requirement that each permit contain monitoring sufficient to assure compliance with all applicable requirements.” 2018 Statement of Basis at 5. For the reasons given below, we conclude that the Conservancy has not demonstrated that the Region clearly erred.

a. *Veolia’s Installation of Activated Carbon Injection Systems on Units #2 and #3*

The Region has described activated carbon injection as “a well-established technology for controlling mercury emissions.” 2019 Resp. to Cmts. at 28. At the time of the 2017 Permitting Decision, Veolia was using an activated carbon injection system to control vapor-phase mercury emissions from Unit #4, but not from Units #2 and #3. *See* 2014 Statement of Basis at 15 tbl.2. Under the terms of the Settlement Agreement, Veolia agreed to add activated carbon injection systems to Units #2 and #3 and, in June 2018, informed the Region that it had done so. *See* 2018 Statement of Basis at 5, 8. The 2019 Permit includes various calibration, recordkeeping, and reporting requirements to ensure that the activated carbon injection systems are operating effectively. 2019 Permit § 1.4, at 10-12; *see* 2018 Statement of Basis at 8-9.

The Region stated that it expects the activated carbon injection systems to minimize emissions of mercury to such an extent that its concerns about the variability of mercury emissions will be alleviated and that the equipment, in conjunction with enhancements to the Facility’s current feedstream analysis procedures, will “obviate the need for multi-metals monitoring devices.”

2018 Statement of Basis at 5, 8; *see also* 2019 Resp. to Cmts. at 45 (stating “additional monitoring is no longer necessary to assure compliance”). The Region further stated that installation of the equipment is expected to “significantly” reduce the Facility’s mercury emissions and result in “better air quality and reduced pollution exposure for all nearby residents.” 2019 Resp. to Cmts. at 45; *see also id.* at 28.

b. *The Region’s Reevaluation of Existing Data*

The Region stated that in light of Veolia’s petition to the Board challenging the Region’s 2017 Permitting Decision, the Region had “reexamined” its technical bases for the monitoring program and had “determined that the majority of the data in the permit record relates to concerns regarding the variability of uncontrolled mercury emissions.” 2018 Statement of Basis at 8. The Region also stated that it had “realized” that the “most relevant” data in the record related to high variability of mercury emissions and that concern about mercury was the “primary driver” behind its decision to require the monitoring program.¹⁶ 2019 Resp. to Cmts. at 28.

The Region explained that once Veolia had agreed to address the Facility’s uncontrolled mercury emissions by installing activated carbon injection equipment, the Region took a hard look at the remaining data and concluded that the data on semi-volatile and low-volatility metal emissions did not support requiring a multi-metals monitoring program. *See* 2019 Resp. to Cmts. at 30. In particular, the Region found only two data points in the record that indicated high readings of semi-volatile and low-volatility metal emissions, and the Region characterized both data points as “anomalous.” *Id.* One data point was obtained during the 2006 comprehensive performance testing and the other during the 2008 comprehensive performance testing. *See id.*; 2018 Statement of Basis at 10-11.

¹⁶ We note that the record for the 2017 Permitting Decision may not be entirely consistent regarding the Region’s conclusions as to the necessity of the proposed multi-metals monitoring program. For example, in the 2014 Statement of Basis the Region stated that the proposed operating parameter limits, including feedrate limits, were “supported by the available CPT [comprehensive performance test] data.” 2014 Statement of Basis at 26. Yet elsewhere in that same document, the Region stated that it was proposing the use of a temporary multi-metals monitoring program to determine whether the proposed operating parameter limits would assure compliance. *Id.* at 57; *see also* 2017 Resp. to Cmts. at 66 (“EPA’s main purpose for imposing the requirement to install and temporarily operate the multi-metals monitoring devices is to verify whether Veolia’s OPLs [operating parameter limits] will assure continuous compliance”).

During the May 2006 comprehensive performance test, emissions of low-volatility metals from Unit #3 exceeded the emission limit due to high levels of arsenic, as measured in micrograms per dry standard cubic meter (“µg/dscm”).¹⁷ 2018 Statement of Basis at 11. While the Region never determined the cause of the high readings, which Veolia had attributed to contamination at the sampling port, *see* 2017 Resp. to Cmts. at 17, a retest of Unit #3 one month later revealed emissions of low-volatility metals to be well below the limit. 2018 Statement of Basis at 11 & n.12. Subsequent measurements of low-volatility metal emissions have remained well below the limit, and the Region characterized the May 2006 results as “an anomaly that appears to have been rectified.” *Id.* at 11.

During the August 2008 comprehensive performance test, measurements of semi-volatile metal emissions from Unit #2 came close to exceeding the interim emission limit then in effect—and would have been in excess of the final limit that took effect several months later—due to high levels of lead.¹⁸ 2018 Statement of Basis at 10-11. Veolia and the Region now agree that the high lead measurement was due to an incorrectly installed spare baghouse, which Veolia subsequently fixed. *Id.* In any event, according to the Region, a retest of the unit one month later showed that the problem had been resolved, and subsequent testing has shown emissions of semi-volatile metals to be well below the emissions limits. *Id.* at 11 n.11. The Region determined that the “anomalous” data points from 2006 and 2008 provide “little support” for concluding that a multi-metals monitoring program is necessary. *Id.* at 11.

As further evidence that a multi-metals monitoring program is not necessary, the Region pointed to data from the 2013 comprehensive performance test showing that the Facility’s emissions of semi-volatile and low-volatility metals are “confined within a very narrow band at the low end of the emission

¹⁷ During the May 2006 comprehensive performance test, measurements of low-volatility metals from Unit #3 averaged 249 µg/dscm, which exceeded the current emission limit of 92 µg/dscm. 2006 Comprehensive Performance Test Report at 3-7; 2017 Resp. to Cmts. at 17.

¹⁸ During the August 2008 comprehensive performance test, semi-volatile metal emissions from Unit #2 averaged 238 µg/dscm. Unit #2 2008 Comprehensive Performance Test Report at 3-5; 2017 Resp. to Cmts. at 17. The interim emissions limit for semi-volatile metals in effect at the time was 240 µg/dscm, and the final limit that took effect on October 14, 2008, was 230 µg/dscm. 2017 Resp. to Cmts. at 17.

standards.”¹⁹ *Id.* The Region emphasized that during the 2013 comprehensive performance test, not only were low-volatility and semi-volatile metal emissions below the HWC NESHAPs limits, they were so far below the limits that semi-volatile metal emissions were within a 99.5% to 93.5% margin of compliance and low-volatility metals emissions were within a 97.2% to 89% margin of compliance. *Id.* The semi-volatile and low-volatility metals emissions from the three units did not approach the emission limits even during the comprehensive performance testing, when feedstreams were spiked with high levels of metals. *See, e.g.*, 2013 Comprehensive Performance Test Report at 1-3 (stating that during testing, feedstreams were spiked with metals and chlorine). The Region reasoned that even if variability were to persist during routine operations, emissions of semi-volatile and low-volatility metals would be unlikely to approach the emission limits. *See* 2019 Resp. to Cmts. at 31; 2018 Statement of Basis at 11. The following tables provide a helpful illustration of the various comprehensive performance tests and retests that were performed.

¹⁹ The Region based the operating parameter limits contained in the 2019 Permit on data from the Facility’s 2013 comprehensive performance testing. *See* 2019 Resp. to Cmts. at 42. Veolia undertook the next round of comprehensive performance testing in 2018, but the Region did not rely on the 2018 data when preparing the 2019 Permit because it had not yet had time to complete its review of the results. *Id.*; *see also* Oral. Arg. Tr. at 46-48. Nonetheless, the 2018 data are in the administrative record for the 2019 Permit, and we note the 2018 data appear to be consistent with results from the 2013 comprehensive performance test.

Table 1: Low-volatility Metals Emissions Limits and Test Results ($\mu\text{g}/\text{dscm}$) (Test Results Calculated as the Average of Three Test Runs for Each Unit per 40 C.F.R. § 63.7(e)(3))						
	May 2006	June 2006	Aug. 2008	Sept. 2008	2013	2018
Emissions Limit²⁰	97	97	97	97	92	92
Unit 2			58.1	6.9	<2.6	<3.4
Unit 3	249	7.61	21.4		<9.4	<4.3
Unit 4			9.6		<9.7	<7.1

Table 2: Semi-volatile Metals Emissions Limits and Test Results ($\mu\text{g}/\text{dscm}$) (Test Results Calculated as the Average of Three Test Runs for Each Unit per 40 C.F.R. § 63.7(e)(3))						
	May 2006	June 2006	Aug. 2008	Sept. 2008	2013	2018
Emissions Limit²¹	240	240	240	240	230	230
Unit 2			238	23.2	<0.95	<2.2
Unit 3	16.6		57.3		<15	<2.0
Unit 4			27.0		<7.8	<8.9

²⁰ The permanent standard of 92 $\mu\text{g}/\text{dscm}$ for low-volatility metals took effect on October 14, 2008. 40 C.F.R. § 63.1219(a)(4) (setting standard); *id.* § 63.1206(a)(1)(ii)(A) (setting compliance date of October 14, 2008). The interim standard for low-volatility metals in effect prior to October 14, 2008, was 97 $\mu\text{g}/\text{dscm}$. *Id.* § 63.1203(a)(4).

²¹ The permanent standard of 230 $\mu\text{g}/\text{dscm}$ for semi-volatile metals took effect on October 14, 2008. 40 C.F.R. § 63.1219(a)(3) (setting standard); *id.* § 63.1206(a)(1)(ii)(A) (setting compliance date of October 14, 2008). The interim standard for semi-volatile metals in effect prior to October 14, 2008, was 240 $\mu\text{g}/\text{dscm}$. *Id.* § 63.1203(a)(3); *accord* 2017 Resp. to Cmts. at 20 n.11; 2018 Statement of Basis at 10 n.10.

Table 3: Mercury Emissions Limits and Test Results ($\mu\text{g}/\text{dscm}$) (Test Results Calculated as the Average of Three Test Runs for Each Unit per 40 C.F.R. § 63.7(e)(3))						
	May 2006	June 2006	Aug. 2008	Sept. 2008	2013	2018
Emissions Limit	130	130	130	130	130	130
Unit 2			57.9		<100	<0.52
Unit 3	61.5		57.9		<48	<0.64
Unit 4			29.1		<10	<67

2006 Comprehensive Performance Test Report § 3.3 & tbl.3-5; Unit #2 2008 Comprehensive Performance Test Report § 3.2 & tbls.3-4 & 3-6; Unit #3 2008 Comprehensive Performance Test Report § 3.2 & tbl.3-3; Unit #4 2008 Comprehensive Performance Test Report § 3.2 & tbl.3-3; 2013 Comprehensive Performance Test Report tbls.1-3 to 1-5; 2018 Comprehensive Performance Test Report tbls.1-3 to 1-5.

While acknowledging that a “real time” multi-metals monitoring program might provide useful information about the accuracy of feedrate limits, the Region determined that a supplemental monitoring program is not necessary. 2019 Resp. to Cmts. at 46; *see also id.* at 38. Instead, the Region concluded that basing feedrate limits for mercury and semi-volatile and low-volatility metals on operating conditions that existed during comprehensive performance testing—which is the default method for establishing those feedrates under the HWC NESHAPs, *see* 40 C.F.R. § 63.1209(l), (n)—will suffice to keep the Facility operating in compliance with emission limits. 2019 Resp. to Cmts. at 43; *see also id.* at 31 (considering “traditional approach” in HWC NESHAPs for establishing operating parameter limits to be appropriate here); *id.* at 38 (describing comprehensive performance tests as “well-established method to correlate feedrates and other combustion parameters with resulting emissions”).

The Region explained that any remaining concerns it had regarding emissions of semi-volatile and low-volatility metals would be addressed by improvements to the Facility’s feedstream analysis procedures and other monitoring requirements contained in the 2019 Permit, including requirements pertaining to the Facility’s baghouse leak detection system, minimum burn temperature, maximum flue gas flowrate, and maximum incinerator pressure. 2019 Resp. to Cmts. at 37; *see also id.* at 40 (summarizing recordkeeping and reporting requirements).

3. *Other Site-Specific Factors*

Of the four site-specific factors that the Region considered in connection with the 2017 Permitting Decision, two pertained to concerns about mercury. Thus, these factors—the site-specific dispersion modeling and risk assessment showing that mercury emissions from the Facility could deposit in and near local lakes, and the 2002 joint study identifying the Facility as a primary contributor to mercury concentrations in the study area—appear to be no longer relevant given the Conservancy’s challenges to the 2019 Permit, which pertain only to low-volatility and semi-volatile metals. *See* Pet. at 17-18.

The Region addressed the third factor (the 2009 spike in ambient levels of arsenic measured by a monitor located less than two miles from the Facility) briefly in a footnote to the 2019 Response to Comments document. *See* 2019 Resp. to Cmts. at 30 n.43. There, the Region explained that the arsenic spike “*may*” have originated from the Facility but that the event “appears to be anomalous” and that the Region has “no evidence at this time suggesting that such an event might recur.” *Id.* Although the Conservancy points to this episode as a factor in support of requiring Veolia to undertake supplemental monitoring, the Conservancy has not identified anything in the record that directly links the Facility to the spike. Veolia points out that the technical report relied on by the Conservancy does not identify any particular facility as the source of the arsenic spike. Veolia’s Resp. Br. at 20; *see* Pet. at 16; Mo. Dep’t of Nat. Res. & Wash. Univ., *Advanced Sampling and Data Analysis for Source Attribution of Ambient Particulate Arsenic and Other Toxic Metals in St. Louis* 42 (Mar. 2010) (A.R. 0257). The Region could have explained in more detail the basis for its conclusion that the spike was anomalous. Nonetheless, the parties have not identified any other evidence in the record to show the arsenic spike has recurred, and, as noted, there is an absence of evidence in the record directly linking this spike to the Facility.

The fourth site-specific factor considered by the Region was the Facility’s location in a community facing environmental justice concerns, which the Region addressed in section D of the 2019 Response to Comments document. 2019 Resp. to Cmts. at 57-75. In section D and elsewhere in the document, the Region detailed the public outreach and engagement efforts it undertook in the community to enhance public participation in the permitting process and to identify and address concerns raised by community members. *See id.* at 12-16, 57-61. The Region acknowledged that “the cumulative risks from aggregate exposures to multiple agents or stressors is an important area for further development” but explained that it lacks the authority in the 2019 Permit to address cumulative risks to the community and that “EPA has not yet developed a procedural guide nor a

regulatory requirement to address cumulative risk in individual CAA Title V Permits.” *Id.* at 59.

In the record for the 2017 Permitting Decision, the Region stated that it considered these four site-specific factors as “further support” for its decision to exercise either its discretionary authority under 40 C.F.R. § 63.1209(g)(2) or its statutory mandate under section 504(c) of the Act, 42 U.S.C. § 7661c(c), to require supplemental monitoring. 2017 Resp. to Cmts. at 25. There is nothing in the 2017 record to indicate that the Region relied on those factors alone to decide that supplemental monitoring is necessary or that the Region determined that those factors *compel* supplemental monitoring. As discussed above and as set forth in the record, we do not view the four site-specific factors as alone sufficient to overcome the Region’s overall determination in the 2019 Permit that supplemental monitoring is not necessary.

In sum, while a Title V permit must require sufficient monitoring to assure compliance, *see* 42 U.S.C. § 7661c(c), the Conservancy has not demonstrated that the Region clearly erred by not adding a multi-metals monitoring program to the 2019 Permit.

C. *Feedstream Analysis Procedures*

In the 2014 Statement of Basis, the Region stated that Veolia’s existing feedstream analysis plan—that is, the feedstream analysis plan Veolia prepared pursuant to the 2008 Permit—“cannot assure compliance with the metals feedrate limits.” 2014 Statement of Basis at 47. As a result, in the 2017 Permitting Decision the Region required more sampling and testing of waste shipments. *See* 2017 Permitting Decision § 2.1(D)(4)(d)(ii)(B), at 44-48. However, in the 2019 Permit, the Region further revised the requirements for feedstream analysis to allow Veolia to differentiate the procedures for “suspect” wastes that are likely to contain metals from “non-suspect” wastes that are not likely to contain metals. *See* 2019 Permit § 2.1(D)(4)(d)(ii)(B), at 42-46; 2018 Statement of Basis at 12-15. While the requirements set forth in the 2019 Permit are more rigorous than those in the 2008 Permit, they are not as rigorous as the requirements that that would have taken effect under the 2017 Permitting Decision. In its Petition, the Conservancy argues that the Region clearly erred because, it alleges, the 2019 procedures are inadequate. Pet. at 18.

Based on the arguments presented and the record, we find that the Conservancy has not carried its burden of showing that the feedstream analysis procedures required by the 2019 Permit are clearly erroneous. The Board traditionally assigns a heavy burden to a petitioner seeking review of issues that are

essentially technical; clear error or abuse of discretion are not established simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). The Board typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer has adequately explained its rationale and supported its reasoning in the administrative record. *In re Gen. Elec. Co.*, 17 E.A.D. 434, 514-15 (EAB 2018).

1. *The Region's Basis for the 2017 Feedstream Analysis Procedures*

The Region revised the requirements for feedstream analysis in the 2017 Permitting Decision after determining that the procedures that Veolia had been implementing under the 2008 Permit were insufficient. In the Statement of Basis that accompanied the 2014 draft permit, the Region stated that enhancements to the 2008 procedures were necessary in order to ensure compliance with feedrate limits for metals. *See* 2014 Statement of Basis at 47. The Region recognized that although the 2008 procedures were sufficient to satisfy the minimum requirements under the HWC NESHAPs, they were nevertheless problematic because they allowed Veolia to over-rely on standardized waste profiles that were not always accurate. *Id.*; *see* 40 C.F.R. § 63.1209(c)(2)(i)-(vi). In reaching this conclusion, the Region relied on a report published by the National Enforcement Investigations Center ("NEIC"), which revealed that Veolia's reliance on its analytical database in lieu of independently sampling and analyzing feedstreams had led to inaccurate characterizations. 2014 Statement of Basis at 49 (citing NEIC, U.S. EPA, *Multimedia Compliance Investigation Report No. NEICVP0972E01* (Aug. 2012) (A.R. 0264) ("NEIC Report")). Under the 2008 Permit, Veolia maintained a "dynamic suspect list" of wastes that were suspected of containing metals. *Id.* While Veolia typically analyzed wastes that appeared on the dynamic suspect list prior to accepting such wastes for incineration, it could, rather than analyze those wastes, use a standard profile designation to calculate the metals' content of the waste if they were considered "similar" to others that had already been accepted. *Id.* The Region expressed concern that Veolia had been using overly broad profiles, causing it to underreport concentrations of metals when calculating feedrates. *Id.* at 49-52. To remedy the situation, the Region included in the 2017 Permitting Decision what it termed "enhanced feedstream analysis requirements," which required additional testing and sampling requirements for incoming waste.²² 2017 Resp. to Cmts. at 9 n.2.

²² The 2017 Permitting Decision would have required the following procedures: (1) for the first five or more shipments of each feedstream received in one calendar year,

2. *The Conservancy Has Not Demonstrated That the Region Clearly Erred in Its Decision to Alter the 2019 Feedstream Analysis Requirements*

In the 2019 Permit, the Region revised the requirements for feedstream analysis proposed in the 2017 Permitting Decision by differentiating the required procedures for “suspect” wastes²³ (wastes that are likely to contain metals) from the procedures for “non-suspect” wastes²⁴ (wastes that are not likely to contain

Veolia would have been required to sample and analyze at least 10% of the containers and calculate the feedrate for those shipments using the analytical results; (2) for the next nine shipments of the same feedstream received, Veolia would have been required to calculate the feedrate using the 95% upper confidence level of the data obtained from the previous sampling; and (3) for every tenth shipment received after the initial five shipments, Veolia would have been required to sample and analyze at least 10% of the containers in the shipment and calculate the feedrate for that shipment using the analytical results, then include that data to recalculate the profile concentration for the nonsampled shipments that follow. *See* 2017 Permitting Decision § 2.1(D)(4)(d)(ii)(B)(I)-(II), at 45. The 2017 procedures would have allowed Veolia to use a combination of laboratory analysis and acceptable knowledge to characterize feedstreams where representative sampling is technically impracticable, and the procedures would have established exemptions for certain types of waste, such as hospital waste. *See id.* § 2.1(D)(4)(d)(ii)(B)(IV), at 46-47, (F), at 50-52.

²³ The 2019 Permit requires Veolia to sample and analyze suspect waste as follows: (1) for the first three or more shipments of each feedstream received in a twenty-four month period, Veolia must sample and analyze at least 10% of containers and calculate the feedrate for those shipments using the analytical results; (2) for the next nine shipments of the same feedstream received, Veolia must calculate feedrates using the arithmetic mean plus two standard deviations of the data obtained in the previous sampling; and (3) for every tenth shipment received after the initial three shipments, Veolia must sample and analyze at least 10% of containers and calculate the feedrate for that shipment using the analytical results, then include that data to recalculate the profile concentration for the nonsampled shipments that follow. *See* 2019 Permit § 2.1(D)(4)(d)(ii)(B)(I)-(II), at 42-43; 2018 Statement of Basis at 13-14.

²⁴ For non-suspect waste, the procedures are as follows: (1) initially, Veolia must either (a) sample and analyze the first preacceptance sample, or at least 10% of containers in the first shipment, of each feedstream received per twelve-month period, or (b) sample and analyze at least 10% of each of the first three or more shipments of each feedstream received per twenty-four month period; and (2) subsequently, Veolia must analyze the next shipment of a feedstream for regulated metals if the waste profile or other information that Veolia obtains indicates a change in feedstream composition such that regulated metals

metals). *See* 2019 Permit § 2.1(D)(4)(d)(ii)(B), at 42-46; 2018 Statement of Basis at 12-15. Under the revised requirements, the wastes in the non-suspect category are still subject to sampling and testing requirements, although less frequently than those in the suspect category. *Id.* The requirements outlined in the 2019 Permit, while less rigorous than the “enhanced” procedures that would have been required under the 2017 Permitting Decision, are nevertheless more rigorous than the those in the 2008 Permit.

The Region initiated the 2019 revisions at Veolia’s request. *See* 2018 Statement of Basis at 12-13; 2019 Resp. to Cmts. at 52. The Region stated that the 2019 procedures are consistent with industry practice and that they will enable Veolia to ensure compliance with applicable requirements while better focusing the company’s resources. 2019 Resp. to Cmts. at 52. For example, the Region explained that the revisions allow Veolia to “invest the most resources in conducting frequent analyses of wastes that have the greatest potential of containing elevated concentrations of metals.” *Id.*

A “suspect waste” is defined as a feedstream that “may contain” or is “expected to contain” mercury or semi-volatile or low-volatility metals. 2019 Permit § 2.1(D)(4)(d)(ii)(B)(I), at 42. A feedstream will be classified as “suspect” if its profile contains a hazardous waste code that is associated with the potential presence of those metals, *or* if Veolia obtains other information from a generator or another source indicating the potential for one or more metals to be present. *Id.*; *see also* 2018 Statement of Basis at 12-14.

A “non-suspect waste” is defined as a feedstream that is not expected to contain mercury or semi-volatile or low-volatility metals. 2019 Permit § 2.1(D)(4)(d)(ii)(B)(III), at 43. A feedstream will be classified as “non-suspect” if its profile does not contain a hazardous waste code that is associated with the potential presence of those metals *and* Veolia obtains other information from the generator or another source indicating that the metals are not present. *Id.*; *see also* 2018 Statement of Basis at 14-15. While non-suspect wastes are not tested as often as suspect wastes, the 2019 Permit requires Veolia to conduct initial sampling and analysis of a waste before placing it on the non-suspect list, and to further conduct additional sampling and analysis at least every two years. 2019 Permit § 2.1(D)(4)(d)(ii)(B)(III), at 43.

may be present. *See* 2019 Permit § 2.1(D)(4)(d)(ii)(B)(III)-(IV), at 43-44; 2018 Statement of Basis at 14-15.

The Conservancy maintains that the Region clearly erred by revising the procedures proposed in the 2017 Permitting Decision. Pet. at 18. *First*, the Conservancy contends that the 2008 procedures did not result in compliance with the Act. *Id.* at 18-22. Whatever merit there may be to the Conservancy's critique of the 2008 procedures, the 2019 Permit includes revisions that are intended to address weaknesses in the existing procedures. Further, the Conservancy acknowledges that the revised requirements in the 2019 Permit are more stringent than the requirements set forth in the 2008 Permit. *Id.* at 23.

Second, the Conservancy maintains that the revisions will not rectify problems with inaccurate waste characterization that the NEIC Report identified in the 2008 procedures. *Id.* at 22-26. More specifically, the Conservancy believes that, under the 2019 Permit, non-suspect wastes will not be subject to a sufficient amount of testing and is concerned that Veolia may continue to rely on inaccurate waste profiles in designating non-suspect waste. *Id.* at 23-25. The Conservancy expresses concern that, as a result, wastes that contain metals could languish in the non-suspect category indefinitely. *Id.* In addition, the Conservancy contends that the process for designating exempt waste is too permissive and that, if anything, given the removal of the multi-metals monitoring requirement from the permit, the feedstream analysis procedures should be made more rigorous, not less so. *Id.* at 26.

The Conservancy acknowledges that the revised procedures "represent an improvement" over the 2008 procedures but states that it "does not believe that this system contains a sufficient amount of testing to resolve the issues identified in the NEIC Report and in the 2017 RTC [Response to Comments]." Pet. at 23. However, the Conservancy does not indicate what level of testing it considers appropriate. Further, notwithstanding the Conservancy's representations to the contrary, the 2017 procedures did not require testing of *all* incoming wastes. *See* 2019 Resp. to Cmts. at 52. As discussed below, the Region addressed the Conservancy's concerns and issues found in the NEIC Report.

In its 2019 Response to Comments document, the Region explained that the 2019 Permit rectifies the issues found in the 2008 Permit. The Region stated that while the frequency of sampling depends on the categorization of the waste, the revised permit includes provisions that, unlike the 2008 Permit, would ensure both suspect and non-suspect wastes are sampled or analyzed. *See* 2019 Resp. to Cmts. at 54. The 2019 Permit requires that Veolia sample and analyze a waste in order to place it on the non-suspect list. 2019 Permit § 2.1(D)(4)(d)(ii)(B)(III), at 43-44. While non-suspect wastes are not tested as often as suspect wastes, they are still subject to an initial test and additional sampling and analysis at least every two

years. *Id.*; *see* Veolia’s Resp. Br. at 35. The Region also maintains that this required sampling of non-suspect wastes rectifies issues regarding Veolia’s past reliance on overly broad profiles. *See* 2019 Resp. to Cmts. at 54. According to the Region, these provisions address the Conservancy’s concerns and prevent a waste that contains metals from “languishing” in the non-suspect category. *Id.*; *see* Pet. at 25 (arguing that materials with “very high metals contents” will be “swept into the non-suspect category” and “languish[]” there). Further, the Region explained that it included provisions that would ensure metal concentrations are not underestimated. *See* 2019 Resp. to Cmts. at 54. For example, metal concentrations that were previously reported as “undetected” in the laboratory analysis must be reported as either one-half of the detection limit or the full detection limit depending on whether the waste is a non-suspect or suspect waste, respectively. *Id.*; *see* 2019 Permit § 2.1(D)(4)(d)(ii)(B)(I)(aa), (III)(aa), at 42, 43.

The Region also determined that categorization of wastes as “suspect” or “non-suspect” is consistent with industry practice. 2019 Resp. to Cmts. at 52. Moreover, any feedstream that includes a hazardous waste code in its profile, under RCRA’s hazardous waste identification scheme, will be identified as a “suspect” waste. *See id.*

The Conservancy also does not explain why Veolia’s procedures for “exempt” wastes—wastes that are impractical to sample due to safety or other concerns—are insufficient. Pet. at 26. The 2019 Permit provides that Veolia may add wastes to the exemption list by providing notice to the Region; the Region then has thirty days to object to the designation and may extend the period further upon request for additional information.²⁵ *See* 2019 Permit § 2.1(D)(4)(d)(ii)(F)(IV)(ff),

²⁵ While the Conservancy, in its comments, generally contended that the feedstream analysis procedures would exempt broad categories of waste from sampling, it did not specifically challenge the Region’s thirty-day provision regarding exempt wastes. *See* Letter from Elizabeth J. Hubertz, Counsel, Am. Bottom Conservancy, to Edward Nam, Dir., Air & Rad. Div., Region 5, U.S. EPA 9, 10-12, 16-18 (Nov. 5, 2018) (A.R. 0459). A petition for review must demonstrate that any issues or arguments raised on appeal were raised previously during the public comment period on the draft permit or were not reasonably foreseeable at that time. 40 C.F.R. § 71.11(D)(1); *see In re Peabody W. Coal Co.*, 15 E.A.D. 757, 760-61 (EAB 2013). Because the Conservancy broadly challenged the feedstream analysis procedures in its comments but did not specifically raise objections to the thirty-day exemption procedures, this issue arguably has not been preserved for Board review. Regardless, as explained in the text, the Conservancy’s argument is not persuasive.

at 51. The Conservancy claims that “given [the Region’s] workload” it is unlikely that the Region would be “sufficiently vigilant and able to devote attention to such changes.” Pet. at 26. But the Region explained in the 2018 Statement of Basis that the “revision to EPA’s review schedule addresse[d] Veolia’s concern that EPA could unnecessarily delay reviewing and responding to its requests, which could cause Veolia to violate the requirements that apply to how long it can store hazardous waste onsite before it must dispose it.” 2018 Statement of Basis at 16. The Conservancy offers no response to the Region’s explanation for the change in the period for review. While it may be the Conservancy’s belief that the Region does not have sufficient time to object, the Conservancy does not provide any factual basis for concluding that the review period is insufficient. Particularly given the presumption of regularity accorded to agencies, the Conservancy’s belief, without more, is insufficient to demonstrate the Region clearly erred in setting the time period for agency review. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (“the Secretary [of Transportation’s] decision is entitled to a presumption of regularity”), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Cowherd v. U.S. Dept. of Housing & Urban Dev.*, 827 F.2d 40, 42 (7th Cir. 1987) (“agency action is given a ‘presumption of regularity’”) (quoting *Overton Park*, 401 U.S. at 415). Thus, the Conservancy has not shown why the procedures for exempt waste are insufficient or any basis for the Board not to defer to the Region’s technical expertise on this issue.

In sum, we conclude that the Conservancy has not satisfied its burden of demonstrating clear error by the Region in its revision of the feedstream analysis requirements.

VI. CONCLUSION

For the reasons stated above, the Board denies the Conservancy’s Petition.

So ordered.