

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the matter of:

VEOLIA ES TECHNICAL
SOLUTIONS, LLC

Permit No. V-IL-1716300103-2014-10
Docket No. EPA-R05-OAR-2014-0280

Appeal No. CAA _____

**PETITION FOR REVIEW OF
A CLEAN AIR ACT PART 71 PERMIT TO OPERATE**

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INTRODUCTION

Pursuant to 40 C.F.R. § 71.11(l), American Bottom Conservancy (“ABC”)¹ hereby petitions the Environmental Appeals Board (“Board”) to review the June 17, 2019 decision by Region 5 of the Environmental Protection Agency (“EPA” or “Region 5”) to issue a federal operating permit pursuant to subchapter V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f, and 40 C.F.R. pt. 71 (“2019 Permit”) for Veolia ES Technical Solutions, LLC’s (“Veolia’s”) hazardous waste incinerator facility located in Sauget, Illinois (“Facility”).² This permit supersedes the federal operating permit issued on January 17, 2017 (“2017 Permit”) which was the subject of a previous appeal to this Board. *In re Veolia ES Technical Solutions, LLC*, CAA 17-02.³

A Title V permit must assure compliance with all applicable Clean Air Act Requirements.⁴ In this case, the 2019 Permit must also assure compliance with requirements of the National Emissions Standards for Hazardous Air Pollution for hazardous waste combustion.⁵ Beginning in 2012, and culminating with the 2017 Permit, EPA compiled an extensive factual record demonstrating the need for

¹ ABC is a grassroots organization based in the Metro-East St. Louis region with the goal of protecting community members from the dangers of air, water, and land pollution in the places where they live, work, and recreate.

² Permit No. V-IL-1716300103-2014-10, dated January 18, 2017. Document ID. EPA-R05-OAR-2014-0280-0273.

³ The docket is available at https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/3ad7345f3b5e7ab88525819f006353fc!OpenDocument&Highlight=2,veolia.

⁴ *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 27 (EAB 2005) (major sources of air pollution must obtain comprehensive operating permits to assure compliance with the requirements of the Clean Air Act.).

⁵ 40 C.F.R. § 63.1200 (“HWC MACT”).

additional monitoring and testing requirements for mercury, semi-volatile metals (“SVM”) and low-volatility metals (“LVM”) ⁶ in order to ensure compliance with the HWC MACT.⁷ Due to site-specific factors, including a large number of unique waste profiles,⁸ EPA determined that despite conducting comprehensive performance tests (“CPTs”) and deriving a feedrate operating parameter limit (“OPL”) from the results of the test, “Veolia’s feedstreams (and, likely, associated emissions) vary ‘minute by minute.’”⁹ EPA found that it “does not have sufficient data to determine that Veolia’s feedrate OPLs, based only on the mix of wastes and combustion conditions occurring during one CPT conducted by Veolia, are sufficient to assure Veolia’s compliance under the variety of mixes of wastes and combustion conditions routinely experienced at the facility.”¹⁰

As a result of these factual findings and in order to ensure compliance with the metals emissions standards, the 2017 Permit included: (1) Condition 2.1(D)(1)(i) which required Veolia to install, calibrate, maintain, and operate multi-metals monitoring devices on Units #2, #3 and #4 for a period of no less than 12 months in

⁶ Semi-volatile metals are lead and cadmium. Low-volatility metals are arsenic, beryllium, and chromium.

⁷ The Docket for Permit No. V-IL-1716300103-2014-10 can be found at [regulations.gov](http://www.regulations.gov). The Docket ID is EPA-R05-OAR-2014-0280.

⁸ Between 2009 and 2013, 70% of Veolia’s waste streams were “distinct”; *i.e.*, not the same as previous waste streams it had accepted. Response to Comments on EPA’s Proposed Air Pollution Control Title V Permit to Operate, at 14, No. V-IL-1716300103-2014-10, dated January 18, 2017. Document ID. EPA-R05-OAR-2014-0280-0274 (“2017 RTC”). Veolia has acknowledged this as well. Comments of Veolia ES Technical Solutions, L.L.C. on Draft Air Pollution Control Title V Permit, at 61, 102 (Dec. 17, 2014), Document ID. EPA-R05-OAR-2014-0280-0111.

⁹ 2017 RTC at 14. Document ID. EPA-R05-OAR-2014-0280-0274.

¹⁰ 2017 RTC at 14-15. Document ID. EPA-R05-OAR-2014-0280-0274.

order to verify the accuracy of the CPTs and the OPLs derived from them;¹¹ and (2) Condition 2.1(D)(4)(d)(ii) which contained enhanced feedstream analysis procedures for mercury, SVM and LVM in order to ensure that the metals content of the calculated feedrate was correctly determined.¹²

The 2019 Permit represents a complete about-face on EPA's part. The 2019 Permit eliminated Condition 2.1(D)(1)(i) and significantly modified Condition 2.1(D)(4)(d)(ii). In support of these changes, EPA relied on: (1) Veolia's installation of mercury controls (which do not affect emissions of SVM and LVM);¹³ (2) "reevaluating" the facts regarding Veolia's emission exceedances in the period from 2008 through 2018;¹⁴ and (3) Veolia's adoption of a feedstream testing regime that does not address Veolia's use of inaccurate metals concentrations – the very thing that the 2017 Permit's enhanced feedstream analysis procedures were designed to correct.

As a result of these changes, the 2019 Permit does not include controls, monitoring, or testing requirements sufficient to compel Veolia's compliance with

¹¹ 2017 Permit at 34-39.

¹² *Id.* at 44-52.

¹³ Condition 1.4 of the 2019 permit requires Veolia to install powdered activated carbon injection ("ACI") systems on incinerators #2 and #3. Response to Comments on EPA's Draft Revised Air Pollution Control Title V Permit to Operate, No. V-IL-1716300103-2014-10, dated June 18, 2019 at 10-12. Document ID. EPA-R05-OAR-2014-0280-645 ("2019 RTC"). Apparently, Veolia has had ACI systems available for installation on these units since 2010, but declined to use them unless the EPA was willing to change other provisions of the Title V permit to conditions more favorable to Veolia. Email from Genevieve Damico to Charles Hall, Jane Woolums and Pamela Blakely (February 12, 2010). *See* ABC Comment Letter, Supplemental Documents, dated November 5, 2018, at 25. Document ID. EPA-R05-OAR-2014-0280-0459.

¹⁴ 2019 RTC at 30. Since the draft Permit was issued in 2018, Veolia has conducted another CPT. The 2019 Permit does not incorporate the results of that test and EPA expects to re-open the permit at a later date. 2019 RTC at 42-43.

the HWC MACT for SVM and LVM. Accordingly, ABC challenges EPA’s removal of former Condition 2.1(D)(1)(i) and its modification of Condition 2.1(D)(4)(d)(ii) in the 2019 Permit as those conditions relate to SVM and LVM. Petitioner details the basis for seeking review below.

ABC requests that the Environmental Appeals Board (“EAB” or the “Board”) grant this petition for review and either vacate the permit, or remand it to EPA Region 5 and order the agency to promptly remedy all deficiencies to ensure that the 2019 Permit contains conditions sufficient to ensure that the Facility operates in full compliance with the Clean Air Act.

THRESHOLD PROCEDURAL REQUIREMENTS

ABC satisfies the requirements for filing this petition for review under 40 C.F.R. § 71.11(l), which provides that “any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision.” ABC filed written comments on the draft permit with Region 5 on November 5, 2018 (“ABC Comments”). Its written comments are described as Comment 323 in the 2019 RTC.¹⁵ ABC also participated in the public hearing on August 2018, described as Comments 318, 331 and 350 in the 2019 RTC.¹⁶

The issues raised in this petition were raised by ABC during the administrative process and were preserved for review. In its written comments,

¹⁵ Comments of American Bottom Conservancy, filed November 5, 2018. Document ID EPA-R05-OAR-2014-0280-0459 (“ABC Comments”).

¹⁶ Transcript of August 21, 2018 Hearing, Document ID. EPA-R05-OAR-2014-0280-0330.

ABC addressed these issues extensively.¹⁷ Its arguments about the effect of ACI on SVM and LVM appear at 15. Its arguments about the new feed stream analysis plan (“FAP”) provisions are found at 17-18. Its arguments about multi-metals monitoring generally are found at 14-16. It has included citations to its comments and to Region 5’s 2019 RTC as appropriate in the sections below.

The filing of this Petition is timely. David Ogulei of Region 5 sent notice of the Final Permit to Petitioner’s counsel on June 18, 2019 via email.¹⁸

FACTUAL AND LEGAL BACKGROUND

Veolia operates a hazardous waste incineration facility in Sauget, Illinois, near East St. Louis. There are three incinerators at the Facility: Units #2 and #3 which are fixed hearth incinerators, and Unit #4 which is a rotary kiln incinerator.¹⁹ Units #2 and #3 are for all practical purposes identical.²⁰

The contested issues first arose in January 2013 when Region 5 issued a draft Significant Modification, adding a multi-metals monitoring condition and an enhanced FAP to Veolia’s 2008 Title V permit (“2008 Permit”).²¹ Region 5 later withdrew the draft, but issued a draft Title V Renewal Permit on September 2014 which contained a similar but not identical multi-metals monitoring provision and

¹⁷ See ABC Comments at 5-18.

¹⁸ See Exhibit 1.

¹⁹ Statement of Basis for Draft Significant Modification to Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10, dated July 13, 2018 at 3. Document ID. EPA-R05-OAR-2014-0280-0287 (“2018 SB”).

²⁰ 2017 RTC at 14 n.4.

²¹ The lengthy background is described in more detail in the 2019 RTC at 8-10.

enhanced feedstream analysis procedures.²² Veolia objected strenuously to these provisions. Region 5 and Veolia attempted to settle the dispute but were unsuccessful.²³ On January 18, 2017, Region 5 issued the 2017 Permit, which still contained similar multi-metals monitoring and enhanced feedstream analysis procedures.²⁴

Veolia appealed to the Board on February 15, 2017, objecting to the legal and factual basis for the multi-metals monitoring and the enhanced FAP.²⁵ Veolia and Region 5 entered settlement discussions almost immediately and agreed to mediation by this body.²⁶ ABC attempted to join the mediation but was not

²² Draft Air Pollution Control Permit to Operate No. V-IL-1716300103-2014-10, dated October 10, 2014, at 34-37; 42-47. Document ID. EPA-R05-OAR-2014-0280-0003.

²³ *See, e.g.*, Letter from Doug Harris to Robert Kaplan, Region 5 Administrator, dated November 15, 2015. Document ID. EPA-R05-OAR-2014-0280-0244.

²⁴ 2017 Permit at 31-39, 44-52. The enhanced feedstream analysis procedures in the 2017 Permit were less rigorous than those in the 2014 draft version.

²⁵ On March 30, 2017, following the visit of its lobbyist with former Administrator Scott Pruitt in Washington, D.C., Veolia announced that EPA HQ would control the settlement discussions. Email from Joseph Kellmeyer to Susan Gardinier, dated March 30, 2017, attached as Exhibit 2. An in-person meeting between Veolia lobbyist Jerry Costello and Pruitt appears to have taken place March 27, 2017, according to documents obtained through a FOIA request and published online by the New York Times. *See* Detailed Pruitt Calendar February to May at page 109/1207 (prep for meeting); at page 112/1207 (meeting). Available at <https://www.documentcloud.org/documents/4064980-Pruitt-Sked-and-McCarthy-Sked.html>. *See also* Curtis Tate, “Illinois ex-Rep. Costello: 3 years out of Congress, 3 times the pay,” McClatchy Washington Bureau (Dec. 12, 2015). Available at https://www.mcclatchydc.com/news/politics-government/congress/article_49278040.html. As EPA notes in the 2019 RTC, there was “nothing unusual” about this type of settlement discussion meeting and members of the public were also free to seek a meeting with Mr. Pruitt but did not. 2019 RTC at 20-22.

²⁶ ABC unsuccessfully sought to join the ADR process. *See* Order, *In re Veolia E.S. Tech. Solutions, LLC.*, CAA Appeal No. 17-02 (E.A.B. dated May 5, 2017).

permitted. Veolia and EPA then abandoned formal mediation by the Board, opting instead for informal discussions.²⁷

On October 2017, EPA and Veolia announced a proposed settlement agreement in which Region 5 would remove the multi-metals monitoring and enhanced FAP provisions from the Title V permit in exchange for Veolia's dismissal of its EAB appeal and Veolia's installation of mercury controls on two of its incinerators.²⁸ After approving the settlement, this Board dismissed Veolia's Petition for Review, and remanded the January 2017 Permit to EPA Region 5, requiring EPA to put out a revised draft permit for public comment. Upon remand, Region 5 issued a draft permit implementing the conditions agreed upon in the appeal: removing the multi-metals monitoring (Condition 2.1(D)(1)(i)); modifying the enhanced FAP provisions (Condition 2.1(D)(4)(d)(ii)); and requiring the installation of mercury controls (Condition 1.4). The 2019 Permit was issued on June 17, 2019 and was largely identical to the draft Permit.²⁹ ABC now files this Petition, appealing the modification of Condition 2.1(D)(4)(d)(ii) and the removal of Condition 2.1(d)(1)(i) as these conditions relate to SVM and LVM. ABC now files this Petition, appealing the modification of Condition 2.1(D)(4)(d)(ii) and the removal of Condition 2.1(d)(1)(i) as these conditions relate to SVM and LVM.

²⁷ ABC unsuccessfully sought to join the settlement discussions. Letter from Catherine Garypie to Elizabeth Hubertz, dated July 11, 2017, attached as Exhibit 3.

²⁸ ABC again objected. Letter from Elizabeth Hubertz to John Krallman, Dec. 18, 2017. Available at <https://www.regulations.gov/document?D=EPA-HQ-OGC-2017-0630-0006>

²⁹ See Exhibit 1.

The CAA Title V program for hazardous waste incinerators such as the Veolia facility, requires the permitting authority (in this case EPA) to impose monitoring and testing requirements which are sufficient to ensure compliance with the HWC MACT requirements. In determining the monitoring and testing requirements to be included, a permitting authority is required to take the following steps for each Title V permit issued.

In determining the monitoring and testing requirements to be included, a permitting authority must take the following steps for each Title V permit issued:

- First, EPA must gather the various emissions limits and determine which monitoring requirements accompany them.³⁰
- Second, EPA must identify “all monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements.”³¹
- When there are no periodic testing requirements in the national emission standard, the permitting authority must add periodic monitoring requirements to permits.³²
- Finally, even when there are periodic testing requirements, EPA must still impose supplemental monitoring requirements if it finds the

³⁰ 40 C.F.R. § 70.6(a)(3)(i)(A).

³¹ 40 C.F.R. § 70.6(a)(3)(i)(A).

³² *Sierra Club v. EPA*, 536 F.3d 673, 681 (D.C. Cir. 2008). Although *Sierra Club v. EPA* construed the provisions of 40 C.F.R. 70.6(c)(1), from Part 70 – the regulatory section that governs state and local agencies’ authority to issue Title V permits – the court observed that its holding “applies equally to the Part 71 Rules,” which are applicable to permits issued by EPA such as Veolia’s here. *Id.* at 675 n.2.

existing monitoring requirements are inadequate to ensure compliance with the permit terms and conditions.³³

This last step often depends on site-specific factors unique to the facility. At all times, EPA must follow the Clean Air Act’s fundamental mandate to “set forth [monitoring requirements] to assure compliance with the permit terms and conditions.”³⁴

The HWC MACT requires Veolia to conduct a CPT every five years to demonstrate compliance with the HWC MACT’s emissions limits for hazardous air pollutants such as mercury, LVM, and SVM.³⁵ A CPT is performed at the extreme end of the normal range of conditions using known quantities of the metals on each incinerator to demonstrate system performance and to establish site-specific OPLs that are designed to ensure compliance with the emissions standards.³⁶ The HWC MACT requires the establishment of maximum feed stream OPLs for SVM and LVM.³⁷

In the five-year period between CPTs, the HWC MACT requires permittees like Veolia to monitor the OPLs rather than the metals emissions themselves. To comply with the feedstream OPL for SVM and LVM, Veolia must analyze the waste it combusts prior to feeding the material into its incinerators.³⁸ This enables it to determine that the amount of metals in the feed stream – used as a proxy for

³³ *Id.* at 675.

³⁴ 42 U.S.C. § 7661c.

³⁵ 40 C.F.R. § 63.1207(b)(1).

³⁶ *See* 2017 RTC at 69 (describing HWC MACT requirements).

³⁷ 40 C.F.R. § 63.1209(n)(ii).

³⁸ 40 C.F.R. § 63.1209(c)(4).

emissions – does not exceed the OPL. The amount of waste entering the incinerators is measured at 15-second intervals and the amount of metals in the waste is calculated based on the concentration of metals believed to be in each waste load.³⁹

To determine the concentration of metals in the feed stream, Veolia must follow the Title V permit’s feedstream analysis procedures, and create an approved FAP.⁴⁰ Analysis conducted pursuant to the plan must be “sufficient to document compliance with the applicable feedrate limits.”⁴¹ The OPLs established in this way are designed to reasonably ensure that the combustor and emission control devices’ future operation will achieve the same level of control as during the CPT.

In 2017, Region 5 found that based on the site-specific facts unique to Veolia’s Facility, the compliance with the OPLs for SVM and LVM could not ensure compliance with the HWC MACT. It first determined that because of Veolia’s widely varying waste streams and because of Veolia’s reliance on inaccurate information about the SVM and LVM content of the feedstreams, it could not be sure that compliance with the feedrate OPL would ensure compliance with the HWC MACT emissions requirement.⁴² Second, it determined, based on the CPT results, that even if Veolia did accurately determine the amount of metals in each feedstream, the incinerators’ emissions rates varied even when identical units were burning the

³⁹ See National Enforcement Investigations Center, Multimedia Compliance Investigations Report, at 14, dated August 2012. Document ID. EPA-R05-OAR-2014-0280-0264 (“NEIC Report”).

⁴⁰ 40 C.F.R. § 63.1209(c)(2)

⁴¹ 40 C.F.R. § 63.1209(c)(1).

⁴² 2017 RTC at 27-28.

same amount of “pure laboratory metals” under highly controlled conditions.⁴³ As a result, the 2017 Permit’s enhanced feedstream analysis procedures in the 2017 Permit and the use of multi-metals monitoring systems for one year in order to confirm the link between the calculated metals feedrate and the metals emissions were designed to correct these problems. In 2019, looking at the same facts, EPA reached the opposite conclusion.

STANDARD OF REVIEW

The Board may grant review when the permitting authority’s decision was based on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 71.11(l)(1)(i). To the extent that EPA ignored facts and disregarded or changed previous findings without explanation, the EPA decision is based on erroneous findings of fact. In addition, to the extent that EPA determined that the 2019 Permit will ensure compliance with the requirements of the Clean Air Act, it is an erroneous conclusion of law. Finally, Petitioner states that the requirements of in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), regarding an agency’s change of mind apply here, and EPA has not provided “a reasoned explanation for ... disregarding facts and circumstances that underlay ... the prior policy.”⁴⁴

ISSUES RAISED

⁴³ 2017 RTC at 20.

⁴⁴ *Id.* at 515-16 (quoted in *Organized Village of Kake v. U.S.D.A.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc). See also *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 728 (D.C. Cir. 2016) (discussing *Fox* in connection with the revocation of a previously issued permit; stopping short of applying *Fox* to agency permitting decisions).

Are the conditions of Title V Permit No. V-IL-1716300103-2014-10 sufficient to ensure that the emissions of SVM and LVM at the Facility do not exceed the limitations of the Clean Air Act when they are based on EPA's clearly erroneous findings of fact or conclusions of law?

ARGUMENT

A. The Factual Basis for the 2017 Permit Does Not Support the Conclusions in the 2019 Permit.

The 2017 Permit was the result of 5 years of analysis and factual investigation. After consideration of Veolia's comments and in reliance on its factual findings, Region 5 found that it did not have "sufficient data to determine that Veolia's feedrate OPLs, based only on only on the mix of wastes and combustion conditions occurring during one CPT conducted by Veolia, [we]re sufficient to assure Veolia's compliance under the variety of mixes of wastes and combustion conditions routinely experienced at the facility."⁴⁵ Region 5 made this determination for SVM and LVM⁴⁶ based on several facts, including:

⁴⁵ 2017 RTC at 14-15.

⁴⁶ In support of the 2017 Permit conditions, Region 5 relied on similar evidence with respect to mercury emissions and the undercounting of mercury in the feedstreams. In connection with the 2019 Permit, EPA concluded that, because of Veolia's installation of ACI on incinerators #2 and #3, Veolia's mercury emissions are now controlled by the ACI. Therefore, EPA is no longer concerned that Veolia has an inaccurate picture of the amount of mercury present in the feedstream or that would be emitted in the absence of the controls. *See* 2019 RTC at 28. Petitioner focuses its arguments on the SVM and LVM data only, even though the waste profiles and variability of emissions for the mercury-related examples indicate a lack of accuracy in similar to that for SVM and LVM..

- the results of a 2006 CPT showing an exceedance of the LVM standard, and subsequent investigations by Region 5 and the Illinois Environmental Protection Agency (“IEPA”);⁴⁷
- the results of a 2008 CPT showing an exceedance of the SVM limit;⁴⁸
- the results of a study indicating that “[o]n April 13, 2009, a continuous ambient metals monitor located less than two miles northeast of Veolia recorded an arsenic concentration of 2,345 nanograms per cubic meter (ng/m), a potentially dangerous level ...” where the “authors’ analysis of publicly available data determined that Veolia was the probable source of the arsenic”⁴⁹
- Measurable differences between the metal emissions reported in the 2013 CPT compared to those reported during the 2006 and 2008 CPTs, even after accounting for differences in metal feed rates and even though known quantities of pure laboratory metals were fed to the incinerators;⁵⁰

⁴⁷ Arsenic levels exceeded the LVM limit. See 2017 RTC at 17 & n.10 (citing 2006 CPT Report and Arsenic Discussion, Document IDs. EPA-R05-OAR-2014-0280-0251 and -0252).

⁴⁸ Lead levels exceeded the SVM limit. 2017 RTC at 15 (citing 2008 CPT Results, Document IDs. EPA-R05-OAR-2014-0280-0253 through 0256).

⁴⁹ Missouri Dep’t of Natural Res. & Washington University, Dept’ of Energy, Environmental and Chemical Engineering, “Advanced Sampling and Data Analysis For Source Attribution of Ambient Particulate Arsenic And Other Air Toxics Metals In St. Louis,” at 42. Document ID. EPA-R05-OAR-2014-0280-0257 (“St. Louis Air Report”). Veolia denies any responsibility for the event. 2017 RTC at 24.

⁵⁰ EPA--Region 5, “System Removal Efficiencies—Calculations.” Document ID. EPA-R05-OAR-2014-0280-0142.

- Veolia’s existing waste identification procedures which may have undercounted metals in the feedstream, in some cases by orders of magnitude;⁵¹
- Veolia’s existing use of unreliable and inaccurate sources such as outdated profiles and generator-provided information to identify metals in the feedstreams;⁵² and
- A non-linear relationship between LVM feedrates and emission rates.⁵³

The 2019 Permit rests on these very same facts, but contains what EPA describes as a “reevaluation.”⁵⁴ The reevaluation references no discernable new facts or studies that would show Region 5’s previous reliance on these facts was misplaced or that circumstances have changed.⁵⁵

Petitioner ABC recognizes that based on EPA’s and Veolia’s representations, the installation of ACI on Units #2 and #3 is likely to control mercury emissions at the Facility⁵⁶ and thus does not challenge the 2019 Permit’s monitoring and testing

⁵¹ NEIC Report at 28-33.

⁵² *Id.* Region 5 issued a finding of violation to Veolia in 2012 based on its inadequate FAP procedures. Finding of Violation, *In re Veolia Technical Solutions L.L.C.*, No. EPA-5-12-IL-15, (August 24, 2012). Document ID. EPA-R05-OAR-2014-0280-0149.

⁵³ EPA, Summary of Veolia’s Historical Metals Emissions at 2 (December 2016). Document ID. EPA-R05-OAR-2014-0258.

⁵⁴ 2018 SB at 14; 16-17.

⁵⁵ The only new technical documents listed in the Administrative Record log found in the 2019 RTC are the January 2019 CPT Report and the Notice of Compliance for the CPT. *See* 2019 RTC at 91 (listing EPA-R05-OAR-2014-0280-0642; EPA-R05-OAR-2014-0280-0643). EPA has not yet incorporated those results into the 2019 Permit. 2019 RTC at 42-43.

⁵⁶ EPA claims the ACI has a 99% removal efficiency for mercury. Given the very large swings between reported amounts in the standard waste profiles and the potential amounts of mercury in the feedstream, it would need to be very efficient to ensure compliance. For example, the NEIC investigation found that while the actual amount of mercury in a feedstream may have been 4140 mg/kg, Veolia’s waste profile used to calculate the feed rate

requirements related to mercury. However, the addition of these mercury controls do not resolve the issues related to SVM or LVM and EPA does not claim otherwise.⁵⁷ In response to ABC's comment raising this issue, EPA indicated that "after reevaluating the technical bases which EPA previously used to support the need for multi-metals monitoring devices, EPA realized this data related primarily to mercury, and not to LVM or SVM."⁵⁸ EPA then discussed other reasons relating to SVM and LVM that it claimed supported its decision to remove the multi-metals monitoring formerly required by Condition 2.1(D)(1)(i).⁵⁹ Later, in response to ABC's comment regarding the modification of the feedstream analysis procedures in Condition 2.1(D)(4)(d)(ii), EPA indicated only that the "new ACI systems would minimize the likelihood of Veolia violating its mercury emissions limits."⁶⁰

B. The 2019 Permit's Feedstream Analysis Procedures for SVM and LVM in Condition 2.1(D)(4)(d)(ii) Will Not Result in Compliance with the Clean Air Act.

1. The feedstream analysis procedures referenced in the 2008 Permit did not result in compliance with the Clean Air Act.

The 2008 Permit required Veolia to develop and implement a feedstream analysis plan containing the characteristics described in the HWC MACT.⁶¹ The

indicated that the feedstream contained only 25 mg/kg of mercury, approximately 1% of 4140 kg/mg. NEIC Report at 22, 24.

⁵⁷ 2019 RTC at 30-31 (after explaining that the controls ensure compliance with mercury emissions limits, Region 5 relies on "other reasons" for its conclusion that multi-metals monitoring is not necessary to ensure compliance with SVM and LVM limits).

⁵⁸ *Id.* at 30.

⁵⁹ *Id.* at 30-31.

⁶⁰ *Id.* at 54. *See also id.* at 45 (discussing ACI in connection with mercury and the FAP in connection with SVM and LVM).

⁶¹ 40 CFR § 67.1209(c)(2); Title V Permit to Operate, at 39 (dated Sep. 12, 2008) Document ID. EPA-R05-OAR-2014-0280-0262.

2008 FAP does not require Veolia to test every shipment of waste that it receives for SVM and LVM.⁶² First, certain types of waste are exempted from testing entirely.⁶³ Region 5 was concerned that the list of exempted wastes – shipments that did not have to be tested – was too broad and allowed metals-containing waste to be added to the feed stream without accounting for the metals in it.⁶⁴

Second, Veolia may rely on information in its computer database,⁶⁵ information known to its employees, information supplied by waste generators, and information available from third parties, like material safety data sheets, to determine the amount of metals in any given waste shipment.⁶⁶ If Veolia considers a waste stream submitted by a generator for approval to be “similar” to waste streams that it already has accepted for treatment at Veolia facilities, rather than sampling the waste, Veolia uses waste profiles that indicate how much of a parameter like SVM or LVM are in the waste stream.⁶⁷ If Veolia considers a waste stream submitted by a generator for approval to be “similar” to waste streams it previously accepted for treatment at Veolia facilities, Veolia does not sample the waste. Instead, it uses waste profiles that indicate how much of a parameter (like

⁶² The National Enforcement Investigations Center (“NEIC”) investigation described the waste acceptance process in more detail, as the process involves a company-wide analytical data base and interacts with the company’s RCRA requirements. NEIC Report at 10-11.

⁶³ *Id.* at 12.

⁶⁴ 2017 RTC at 26.

⁶⁵ Veolia maintained what it called a “dynamic suspect list”; a listing of waste profiles that it believed contained metals. Waste on the list was subject to additional metals testing whereas other wastes were not tested for metals. NEIC Report at 15.

⁶⁶ 2017 RTC at 125-26 (citing Veolia’s comments); NEIC Report at 15.

⁶⁷ NEIC Report at 11; 2017 RTC at 91 (discussing use of profiles).

SVM or LVM) are in the waste stream.⁶⁸ For example, when Veolia assigns profile 660210 to a waste shipment, the stored profile indicates that the waste contains 1 mg/kg cadmium.⁶⁹ Unless Veolia conducts testing that indicates otherwise, every time it receives a shipment of CI5789, it will feed the waste into the incinerator assuming the shipment contains at least that much cadmium.⁷⁰

The 2017 RTC, Region 5 identified flaws in the FAP procedures that lead to undercounting of SVM and LVM in the feedstream. First, Region 5 noted the extreme variability of waste streams that the Facility handled. Nearly 70% of the waste streams the Veolia facility handles are unique, meaning that Veolia has never received a stream with the same profile before.⁷¹

Second, Region 5 noted a 2012 NEIC investigation that randomly examined feedstreams combusted at the Facility in 2009 through 2011.⁷² In this investigation, the NEIC discovered discrepancies between Veolia's profiles and the combusted at the Facility in 2009-11.⁷³ In this investigation, NEIC discovered discrepancies between Veolia's profiles and the results of actual testing. Region 5 summarized the NEIC Report's findings for one profile containing an LVM:

Profile CARBN1 is a generic profile broadly used by Veolia that uses a standard concentration value of chromium of 139 mg/kg. One of the load

⁶⁸ NEIC Report at 11; 2017 RTC at 91 (discussing use of profiles).

⁶⁹ NEIC Report at 21.

⁷⁰ *Id.* at 14.

⁷¹ *See supra* note 8. It does not appear that EPA has undertaken a similar survey of waste streams since that period and EPA does not apparently contend that the variability of waste profiles has changed significantly.

⁷² NEIC Report at 15.

⁷³ NEIC Report at 15.

receipts, received on April 8, 2011, and sampled and analyzed on June 9, 2011, had an actual chromium concentration of 99,780 mg/kg.⁷⁴

That is a large difference magnitude – 717 times larger, to be exact.

Veolia’s broad use of profiles and its use of different profiles for “very similar waste streams generated by different generators,” was also problematic. The NEIC Rport discusses two of these profiles, each described as “cyanide containing wastes.”⁷⁵ One profile, CI5789, used a cadmium value of 6,470 mg/kg while the other used a cadmium value of 1 mg/kg.⁷⁶ These profiles should have had more similar cadmium values, given their respective sources, so that NEIC recommended testing each shipment in order to be certain that the metals amounts were correct.⁷⁷

The investigation also noted discrepancies between Veolia’s profiles and the profiles provided by the MSDS or other sources. Profile 236152 contained a material safety data sheet indicating that the chromium content of the waste was between 30,000 mg/kg and 60,000 mg/kg.⁷⁸ Veolia’s ICS data base indicated that the chromium content of the waste stream was only 228 mg/kg. Again this is a huge difference.

Veolia also had in use a number of suspiciously similar profiles with a pattern of identical metals counts as follows:

Veolia has several profiles that contain metals results identical to those used in other profiles. There is a concern regarding insufficient testing of incoming

⁷⁴ *Id.* at 26.

⁷⁵ *Id.* at 24.

⁷⁶ *Id.* at 26. Relatedly, NEIC found that another profile, Profile 374339, described as containing “organic debris” was used for a wide range of shipments that could similarly have widely varying metals contents. *Id.*

⁷⁷ *Id.* at 21, 24.

⁷⁸ *Id.* at 24.

wastes under these profiles: Table 5 shows the number of times that a “pattern” of metals values was repeated for different profiles that were received in quantities greater than 20,000 pounds in 2010 and 2011.⁷⁹

For example, Table 5 shows that one pattern of metals was used for 49 different profiles.⁸⁰

As a result of the above, in 2017, Region 5 concluded that enhanced feed stream analysis procedures were necessary.⁸¹ Instead of relying on historical profiles and generator-supplied information, Veolia needed to test more shipments at its Facility in order to accurately calculate the metals in the waste and ensure compliance with the feedstream OPL for LVM and SVM. Condition 2.1(D)(4)(ii) of the 2017 Permit outlined the feedstream analysis procedures Veolia was to use.⁸²

2. The feedstream analysis procedures in the 2019 Permit will not rectify the problems identified with the 2008 Permit’s procedures.

The feedstream analysis procedures in the 2019 permit⁸³ are based on a discussions with Veolia that took place in 2015.⁸⁴ The 2019 Permit allows Veolia to separate waste streams into “suspect” and “nonsuspect” categories of waste. Suspect waste streams are those that Veolia believes may contain SVM, LVM, or other metals. The 2019 Permit defines them:

A feedstream would be classified as a suspect waste if the profile contains a hazardous waste code that is associated with the potential

⁷⁹ *Id.* at 24-25 and Table 5.

⁸⁰ *Id.*

⁸¹ 2017 RTC at 9.

⁸² 2017 Permit at 42-52.

⁸³ As indicated, Veolia has not yet prepared a new FAP in accordance with the 2019 permit. See 2019 Permit at 41.

⁸⁴ *See* Email from David Ogulei to Genevieve Damico, dated Sep. 21, 2015. Document ID. EPA-R05-OAR-2014-0280-0245; Email from David Ogulei to Genevieve Damico, dated Sep. 3, 2015. Document ID. EPA-R05-OAR-2014-0280-0246.

presence of MACT metals, or if other information the Permittee obtains from the generator or another source, including but not limited to the safety data sheet (SDS), indicates the potential for any MACT metals to be present.⁸⁵

As in the 2008 Permit and FAP, the determination of whether a stream is suspect can be based on Veolia's own records of previous shipments, the waste generator's description, and outside sources.⁸⁶

Metals testing of suspect waste occurs on a shipment basis; a shipment being the collection of all feedstreams that appear on the manifest received from a waste generator.⁸⁷ If it uses this protocol, Veolia must "sample and analyze at least ten percent of containers in each of the first three or more shipments of each feedstream received at the facility per 24-month period."⁸⁸ Thereafter, it must sample and analyze ten percent of containers in every tenth shipment."⁸⁹ In both cases, it must incorporate the results of the metals analysis into the waste profile.⁹⁰

The 2019 Permit's provisions represent an improvement over the system Veolia used before. However, ABC does not believe that this system contains a sufficient amount of actual testing to resolve the issues identified in the NEIC Report and in the 2017 RTC.⁹¹ It still allows for reliance on information from the Veolia database that the NEIC investigation showed was wildly inaccurate. For

⁸⁵ 2019 Permit at 42.

⁸⁶ *Id.* at 42 (Condition 2.1(D)(4)(d)(ii)(B)(I)).

⁸⁷ *Id.* (Condition 2.1(D)(4)(d)(ii)(B)).

⁸⁸ *Id.* (Condition 2.1(D)(4)(d)(ii)(B)(I)(aa)).

⁸⁹ *Id.* (Condition 2.1(D)(4)(d)(ii)(B)(II)(aa)).

⁹⁰ *Id.* (Conditions 2.1(D)(4)(d)(ii)(B)(I)(bb) and (II)(bb)).

⁹¹ In the 2019 RTC, EPA compares the 2019 Permit conditions to those in the 2017 Permit. 2019 RTC at 54.

example, Veolia must conduct additional testing and possibly make changes to its waste profile if it “determines through a review of other information” that the metals levels are incorrect.⁹² Nothing requires Veolia to seek out this information, and as a Region 5 official observed in 2012, the generators have “no particular interest in knowing the exact composition of their waste.”⁹³

The 2019 Permit still allows for the use of broad categories even in circumstances where there is tremendous variation within the category. For the very broad profile 374339 – described as “containing organic debris” – NEIC recommended that Veolia test every waste load.⁹⁴ Waste profile CARBN1 had a standard value of 139 mg/kg chromium, yet one waste load assigned to that profile had a tested value of 99,780 mg/kg chromium. Either of those values could be an outlier, and the recalculated profile value could be seriously off, depending on which loads are sampled. EPA responds by pointing out that waste streams that were never tested before are more likely to be tested now.⁹⁵ While the greater frequency of sampling and testing and revision of waste profiles, as required by the 2019 Permit, may eventually allow the waste profile to approach accuracy, “eventually” is not the time frame for hazardous metals emission compliance under the MACT.⁹⁶ In

⁹² 2019 Permit at 43 (Condition 2.1(D)(4)(d)(ii)(B)(VII)(cc)).

⁹³ ABC Comments at 22.

⁹⁴ NEIC Report at 23. Veolia apparently told EPA that it was testing each shipment with this profile. 2017 RTC at 144. However, the 2019 Permit does not require this to continue.

⁹⁵ 2019 RTC at 55.

⁹⁶ 40 C.F.R. § 71.6(a)(1) (Title V permit must compel compliance at the time of issuance).

the meantime, untested waste streams containing widely varying concentrations of metals will continue to slip through the cracks.

Nonsuspect waste streams are those that Veolia believes do not contain SVM and LVM or other metals.⁹⁷ These waste streams are subject to significantly less testing than the suspect waste streams.⁹⁸ The treatment of non-suspect wastes is especially concerning, because once a waste is deemed “non-suspect” and passes the initial review, it does not have to be tested again unless the generator-supplied waste profile changes.⁹⁹ Given the enormous variation in reported metals content among waste with the same profile, it is reasonable to be concerned that metals-containing waste streams will permanently be consigned to the non-suspect category.

EPA responded to this point by noting that Veolia will assign a minimum metals content to all waste streams, even those that indicate a zero concentration of metals.¹⁰⁰ This still does not resolve the NEIC-observed issue of wide variations within a profile category and very high metals concentrations being swept into the non-suspect category and languishing there.

⁹⁷ 2019 Permit at 43 (Condition 2.1(D)(4)(d)(ii)(B)(III)).

⁹⁸ *Id.* at 43 (Condition 2.1(D)(4)(d)(ii)(B)(III)(aa)).

⁹⁹ 2019 Permit at 44 (Condition 2.1(D)(4)(d)(ii)(B)(IV)). In 2012, Veolia was using a profile that it had generated in 1999. NEIC Report at 21. It stated that it tested this waste on site because the profile had a high cadmium value, but that would not happen if it were a non-suspect waste with a similarly old profile.

¹⁰⁰ 2019 RTC at 54

There are also a number of exempt categories of waste in the 2019 Permit.¹⁰¹ The 2019 Permit allows Veolia to add other waste streams to the list of exempt categories, merely by notifying EPA and allowing the agency 30 days to object.¹⁰² While ABC would like to believe that EPA is sufficiently vigilant and able to devote attention to such changes, it is unlikely given EPA's workload. More should be required before a waste stream is placed into the permanent exemption. The mere passage of 30-day period is insufficient.

Moreover, the importance of a rigorous FAP is more important than ever since Condition 2.1(D)(i), the multi-metals monitoring condition, is no longer part of the 2019 Permit. That condition would have provided additional information about the relationship between the feedstream contents and emissions and served as a cross-check on the accuracy of the metals feedrate. The absence of that condition requires a more stringent FAP than the 2017 Permit, not a less stringent one. Because the 2019 Permit relies on erroneous facts, it will not resolve the many problems with Veolia's feedstream analysis procedures and will not result in accurate calculations of the feedrate OPL for SVM and LVM which is the HWC MACT-required method for ensuring compliance with the Clean Air Act.

C. The Complete Removal of Condition 2.1(D)(1) From the 2019 Permit Without a Replacement Means that the Permit Will Not Ensure Compliance.

¹⁰¹ 2019 Permit at 48 (Condition 2.1(D)(4)(d)(ii)(F)). Petitioner does not dispute that there are categories of waste that should legitimately be exempt from testing.

¹⁰² 2019 Permit at 51 (Condition 2.1(D)(4)(d)(ii)(F)(IV)(ff)). EPA may extend the period if it asks for additional information. *Id.* at 50-51 (Condition 2.1(D)(4)(d)(ii)(F)(IV)).

In 2017, Region 5 not only found that Veolia's feedstream/wastestream metals testing was insufficient to ensure Veolia was in compliance with the feedrate OPL, it also found that – because of the substantial uncertainty regarding the metals content of the feedstream – it could not be confident that Veolia was in compliance with the HWC MACT on a day-to-day basis. In other words, due to site-specific facts unique to Veolia, even if Veolia was in compliance with the feedrate OPL, it might still be in violation of the emission limit.

Veolia does not monitor its emissions for SVM or LVM, instead using the OPLs generated during the CPT as a proxy for emissions as required by the HWC MACT. During the CPT itself – once every five years – emissions are monitored to test the incinerators' performance and determine the emissions by combusting a fixed quantity of the metals of concern.¹⁰³ The CPTs are performed under conditions completely controlled by Veolia and Veolia plans extensively for the CPTs in advance.¹⁰⁴ Because of this, a violation of the HWC MACT during a CPT is concerning. If a violation occurs under the most carefully controlled conditions, then what is happening during the less controlled stress and strain of every day operation?

That was Region 5's point in 2017. During the 2006 CPT, there was a violation of the LVM standard. During the 2008 CPT, there was a violation of the

¹⁰³ See 2006 CPT Report at 3-1 (describing emissions). Document ID. EPA-R05-OAR-2014-0280-252.

¹⁰⁴ Letter from Sara Breneman to Doug Harris, dated Sept. 2013 (approving Veolia's 2013 CPT plan). Document ID. EPA-R05-OAR-2014-0280-259. 2017 RTC at 15-16, 20-21, 28 (discussing difference between controlled CPT conditions with known quantities of metals and daily operations).

SVM standard. The 2013 CPT had results that could not be lined up with the results of either previous CPT.¹⁰⁵ In between the 2008 and the 2013 CPT, there was a spike in the arsenic levels in East St. Louis, measured at a location close to the Facility.¹⁰⁶

Veolia has long disputed the evidence described above. In 2006, it attributed the exceedance to “contamination from rust/scale.”¹⁰⁷ Region 5 and IEPA investigated Veolia’s explanation to determine if it accurately described the reason for the exceedance. It did not.¹⁰⁸ IEPA referred the matter to the Illinois Attorney General’s Office for enforcement although no further action appears to have been taken.¹⁰⁹ In 2019, EPA changed its mind, repudiated its and IEPA’s earlier investigations, and now describes that event as anomalous.¹¹⁰ Re-designating the 2006 arsenic exceedance as anomalous also required EPA to discount Veolia’s responsibility for the arsenic spike in 2009.¹¹¹ EPA offered no other explanation for the arsenic spike.¹¹²

In 2008, Veolia attributed the lead exceedance to an improperly installed baghouse.¹¹³ Region 5 concluded that the baghouse was indeed improperly installed

¹⁰⁵ 2017 RTC at 20.

¹⁰⁶ *See id.* at 24 (citing St. Louis Air Report at 42). The authors of the report attributed the spike to Veolia’s operations, although Veolia denies responsibility,

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 2019 RTC at 30.

¹¹¹ *Id.* at 30 n.43.

¹¹² *Id.*

¹¹³ 2017 RTC at 17.

and had been for some unknown length of time.¹¹⁴ Region 5 did not find the baghouse issue exculpatory as Veolia argued. Instead, Region 5 found it concerning not only that an emission control device was not discovered before the once-every-five-years test and that the baghouse had been incorrectly installed for an undetermined period of time before the 2008 CPT.¹¹⁵ EPA's explanation for the change is again that it was an anomalous result that does not require any further attention.¹¹⁶

Finally, EPA claims the earlier exceedances were anomalous because the 2013 CPT showed no exceedances of SVM or LVM.¹¹⁷ But this fact was also true in 2017. As Region 5 explained then, "due to the significant flaws in Veolia's prior feed analysis program, it is nearly impossible to determine what is fed into the facility's incinerators on a day-to-day basis, making it practically infeasible to correlate what Veolia burns during the CPT with the day-to-day feedstream."¹¹⁸

The CPT is supposed to use high concentrations of metals – higher than the facility is likely to encounter during day-to-day operation – to generate limits that will be protective under normal operating conditions.¹¹⁹ If the metals concentrations fed during the CPT concentrations are not extremely high, then day-to-day compliance with the feedrate limit generated during the CPT does not provide the

¹¹⁴ *Id.*

¹¹⁵ 2017 RTC at 17.

¹¹⁶ 2019 RTC at 30. ABC would note that two anomalous events in a row are better described as a pattern of so-called anomalies.

¹¹⁷ 2019 RTC at 30.

¹¹⁸ 2017 RTC at 26.

¹¹⁹ *Id.* at 39 (citing 69 Fed. Reg. 21197, 21218, April 20, 2004, HWC MACT Proposed Rule). *See also* 40 C.F.R. §§ 63.1206(b)(2), 63.1207(f)(1) and (g)(1).

same assurance that day-to-day operations will comply with HWC MACT limits. EPA does not explain its new-found confidence in the results of CPT testing in Veolia's 2019 RTC, except by noting that the SVM and LVM emissions were in compliance during the 2013 CPT.¹²⁰

Moreover, in 2017, Region 5 also noted that "the SVM and LVM feedrates to Units 2, 3 and 4 were approximately equal while the measured SVM and LVM emissions from the respective units varied considerably."¹²¹ This again suggests that even if Veolia had a good understanding of the metals content of its feedstreams, it still would not be able to predict the metals emissions with accuracy.¹²² EPA does not offer an explanation for its decision to abandon a condition that would have verified the link between the metals feedrate and metals emissions other than the 2013 CPT's demonstration of compliance.¹²³

According to the administrative record, from January 2017, when EPA issued the 2017 Permit, to October 2017 when EPA agreed to remove the multi-metals monitoring condition from the revised permit on remand, to July 2018 when EPA issued the Draft Permit, and to June 2019 when it issued the 2019 Permit, EPA

¹²⁰ 2019 RTC at 38-39. EPA also appears to have misunderstood Petitioner's use of EPA precedent regarding infrequent monitoring. ABC is concerned only with the monitoring for mercury, SVM, and LVM, not with the monitoring that the HWC MACT requires for any other parameter, as EPA assumes. *See* 2019 RTC at 39-42.

¹²¹ Summary of Veolia's Historical Metals Emissions at 3-5. Document ID. EPA-R05-OAR-2014-0258. This is most clearly indicated in a comparison of Figure 3, showing for the 2013 CPT nearly identical feedrates of LVM fed to identical Units #2 and #3, with Figure 6 showing a marked difference in the emissions of LVM from Units #2 and #3 during the same test.

¹²² 2017 RTC at 14.

¹²³ 2019 RTC at 30, 36.

conducted no further testing and considered no new evidence (at least that was placed in the administrative record).¹²⁴ EPA’s reconsiderations and reevaluations amount to “We changed our mind.” Of course a federal agency is allowed to change its mind, especially when there has been a change in administration. But administrative law still constrains the decisionmaker. In *Fox*, the Court held that when a federal agency changes its mind about a policy, it must, among other things give “good reasons” for the new policy.¹²⁵ When the “new policy rests upon factual findings that contradict those which underlay its prior policy,” the new decision must be supported by “a reasoned explanation ... for disregarding facts and circumstances that underlay ... the prior policy” and a “more detailed justification than what would suffice for a new policy created on a blank slate.”¹²⁶

Organized Village of Kake provides an extensive discussion of the kind of “good reasons” that justify a dramatic about-face.¹²⁷ In 2001, the USDA found, based on extensive factual findings, that the “the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast Alaska] communities’ from application of the Roadless

¹²⁴ 2019 RTC at 91 (chart of documents relied on). Veolia has long contended that EPA lacks the authority to impose permit conditions in addition to the requirements of the HWC MACT and that the multi-metals technology is untested and unreliable. *See* Petition for Review, *In the Matter of Veolia ES Technical Solutions, L.L.C.*, CAA No. 17-02, at 8-10, 13-16, 23-25. Document ID. EPA-R05-OAR-2014-0280-0280. In the 2019 RTC, EPA does not repudiate its authority to impose a condition like the multi-metals monitoring or make a determination that the use of such a monitoring device is infeasible. 2019 RTC at 33-34; 49. Instead, EPA rests the 2019 permit revision on its determination that such a condition is not necessary. 2019 RTC at 30, 31, 49. Should EPA change its mind as to this aspect of the permit revision, ABC reserves the right to address those arguments as they are made.

¹²⁵ *Fox*, 556 U.S. at 515.

¹²⁶ *Id.* at 516-16.

¹²⁷ 795 F.3d at 967.

Rule.”¹²⁸ In 2003, following a change in administration, and in reliance on the same record, the agency found that “the social and economic hardships ... outweigh the potential long-term ecological benefits”¹²⁹ The Ninth Circuit held: “The 2003 ROD does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a ‘minor’ one[,]” even allowing for a change in the way the agency valued socioeconomic hardship.¹³⁰

Just as in *Organized Village of Kale*, where the USDA downgraded environmental risks from “prohibitive” to “minor” in order to accomplish its shift of position, so here EPA:

- recasts emissions exceedances as “anomalous” instead of probative,
- “reevaluates” significant variability between metals amounts in waste profiles and the actual content of the feedrate, and
- “reevaluates” significant variability between the metals concentration in the feedrate and the metals emissions.

EPA does this to remove or change the conditions Region 5 believed necessary two years before. The 2019 Permit will not ensure compliance with the Clean Air Act and should be vacated and/or remanded to EPA for further proceedings on this basis.

¹²⁸ 795 F.3d at 967.

¹²⁹ *Id.*

¹³⁰ *Id.* at 969. The Ninth Circuit also found that USDA’s desire to avoid litigation over the 2001 decision was an insufficient justification since the change in position “predictably” resulted in a challenge by those who had benefitted from the earlier decision. *Id.* at 970.

CONCLUSION

The 2019 permit for the Veolia Facility fails to ensure compliance with applicable requirements under the Clean Air Act. ABC requests the EAB review whether the EPA erred in its factual and legal conclusions by not adequately addressing verification of the OPLs and feedstream analysis procedures as related to SVM and LVM emissions. ABC requests the EAB either vacate the Title V permit based on the aforementioned deficiencies or remand to the EPA to address the aforementioned deficiencies and approve a Title V permit that fully complies with the Clean Air Act.

Respectfully submitted,

/s/ Elizabeth Hubertz

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LIST OF EXHIBITS

1. Email from David Ogulei, Region 5, EPA, to Elizabeth Hubertz, IEC, dated June 18, 2019.
2. Email from Joseph Kellmeyer to Susan Gardinier, dated March 30, 2017.
3. Letter from Catherine Garypie to Elizabeth Hubertz, dated July 11, 2017.

STATEMENT OF COMPLIANCE WITH PAGE LIMITATION

Pursuant to the August 12, 2013, Standing Order titled Revised Order Authorizing Electronic Filing Procedures Before The Environmental Appeals Board Not Governed By 40 C.F.R. Part 22, this document, exclusive of the certificate of service, table of contents, and table of authorities, does not exceed 50 pages in length.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board, that on July 16, 2019, the foregoing was filed electronically with the Clerk of the Environmental Appeals Board using the EAB eFiling System, as authorized in the August 12, 2013, Standing Order. The foregoing is also being served by next day Federal Express in hard copy paper form on the following:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
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Washington, D.C. 20004

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/s/ Elizabeth Hubertz
Elizabeth Hubertz

Hubertz, Elizabeth

From: Ogulei, David <Ogulei.David@epa.gov>
Sent: Tuesday, June 18, 2019 12:11 PM
To: Hubertz, Elizabeth
Subject: EPA Issues Clean Air Act Permit for Veolia's Hazardous Waste Incinerator in Sauget, Illinois

Dear Elizabeth Hubertz,

Thank you for your interest in the U.S. Environmental Protection Agency's Clean Air Act permitting actions for the Veolia ES Technical Solutions, L.L.C. (Veolia) hazardous waste treatment and storage facility located at 7 Mobile Avenue in Sauget, Illinois. Please note that EPA has completed its review of all comments submitted on the draft Clean Air Act Title V operating permit it issued for the Veolia facility in July 2018 (draft permit) and has decided to issue the final permit without changes from the draft permit. In making this decision, EPA considered the expressed views of all interested persons as well as pertinent federal statutes and regulations.

EPA has prepared a response to comments document (RTC) that responds to all relevant comments submitted by the end of the comment period. The [final permit and RTC](#) are available at <https://www.regulations.gov/>, [Docket ID. EPA-R05-OAR-2014-0280](#), and <https://www.epa.gov/caa-permitting/veolia-sauget-air-permitting>. If you would like a copy of the permit sent to you directly by either mail or electronic mail, please reply to this email with your request.

If you no longer wish to be notified of air permitting actions involving the Veolia facility, please reply to this email with your request to be removed from our distribution list for this facility.

Your Appeal Rights

Pursuant to 40 C.F.R. § 71.11(l), any person who filed comments on the draft permit or who participated in the public hearing may petition the Environmental Appeals Board (EAB) to review any condition of the final permit decision. Such a petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period to the extent required by 40 C.F.R. § 71.11, and, when appropriate, a showing that the condition in question is based on:

- (1) A finding of fact or conclusion of law which is clearly erroneous; or
- (2) An exercise of discretion or an important policy consideration which the EAB should, in its discretion, review.

Additionally, any person who did not comment on the draft permit or participate in the public hearing may petition for administrative review only to the extent of the changes from the draft to the final permit decision or other new grounds that were not reasonably foreseeable during the public comment period on the draft permit.

You may file documents with the EAB electronically, by mail, in person, and in limited circumstances, by facsimile. The EAB considers a document to be filed when it is received by the Clerk of the EAB. Instructions on how to file your documents is available from the [EAB web site \(https://www.epa.gov/eab\)](https://www.epa.gov/eab). All documents sent through the U.S. Postal Service (except by U.S. Express Mail) MUST be addressed to the EAB's mailing address:

Clerk of the Board

U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, D.C. 20460-0001

All documents that you deliver in person or that you arrange to have delivered by courier (including delivery by U.S. Express Mail or a by commercial delivery service such as Federal Express or UPS) MUST be delivered to the EAB's hand-delivery address:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
WJC East Building
1201 Constitution Avenue, NW
Room 3332
Washington, D.C. 20004

Pursuant to 40 C.F.R. § 71.11(i)(2), the final permit will become effective on July 18, 2019 unless the permit is appealed to the EAB as discussed above. If the permit is appealed, the specific terms and conditions of the permit which are the subject of the appeal will be stayed during the pendency of the appeal. 40 C.F.R. § 71.11(i)(2)(ii).

Sincerely,

David Ogulei
U.S. Environmental Protection Agency
Region 5 | Air & Radiation Division | AR-18J
77 West Jackson Blvd. | Chicago, Illinois 60604
Phone: (312) 353-0987 | Ogulei.David@epa.gov

Exhibit 2

To: Gardinier, Susan[Gardinier.Susan@epa.gov]
Cc: Kellmeyer, Joseph[JKELLMEYER@thompsoncoburn.com]; Kemper, Ryan Russell[RKemper@thompsoncoburn.com]; Garypie, Catherine[garypie.catherine@epa.gov]; Krallman, John[krallman.john@epa.gov]; Steinbauer, Gary[steinbauer.gary@epa.gov]
From: Kellmeyer, Joseph
Sent: Fri 3/31/2017 10:47:24 PM
Subject: FW: Veolia ADR: Conference call next Tuesday

Susan –

Thank you for your e-mail. Veolia remains dedicated to resolving this matter with USEPA.

Unfortunately, despite Veolia's request, Gary's March 22nd e-mail failed to provide Veolia with the name and title of an EPA representative who had decision making and ultimate binding authority for the ADR process.

In light of the clear message contained within David Schnare's March 2nd e-mail that the Chief Administrator's office wished to be involved in matters such as this and the lack of clarity in Gary's e-mail, Veolia felt necessary to contact and meet with EPA's headquarters in Washington D.C. Veolia and Veolia's consultant therefore met with Administrator Pruitt and his chief of staff this past week. I did not attend the meeting. It is my understanding that Administrator Pruitt is currently reviewing the next steps in Veolia's permitting process. Therefore, I suggest that we delay the ADR process until Administrator Pruitt has finished his review and a clear path forward is determined. I am certain that all parties involved do not wish to proceed in a manner inconsistent with Administrator Pruitt's desires.

I appreciate your anticipated cooperation in this regard and will be back in touch once Administrator Pruitt provides a path forward.

Joseph M. Kellmeyer

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One US Bank Plaza

St. Louis, Missouri 63101

www.thompsoncoburn.com

From: Gardinier, Susan [<mailto:Gardinier.Susan@epa.gov>]

Sent: Thursday, March 30, 2017 3:37 PM

To: Kellmeyer, Joseph; Kemper, Ryan Russell; Chamberlain, Sara L.; Harner, Benjamin S.; Garypie, Catherine; Steinbauer, Gary; Krallman, John

Cc: Avila, Aaron

Subject: Veolia ADR: Conference call next Tuesday

Good afternoon,

This is a reminder that we have the ADR status conference scheduled for Tuesday, April 4, at 3 pm Eastern Time/2 pm Central Time. Again, the call should last between 30 and 45 minutes, and we will use the time to discuss the parameters of the ADR proceeding as well as logistics for conducting the ADR.

In addition to Judge Avila and myself, thus far we have confirmed that Catherine Garypie and Gary Steinbauer will join the call on behalf of Region 5, and John Krallman from EPA's Office of General Counsel will also participate.

Counsel for Veolia: please "reply all" to this message and confirm who will be participating in the call next Tuesday.

Please use the following information to join the conference call next Tuesday:

Conference Line: (866) 299-3188

Conference Code: 2022330122#

As mentioned in my previous email, Judge Avila would like to receive your confidential issue summaries no later than Friday, April 14. In addition, each party's signed agreement to participate in the ADR must be submitted no later than Friday, April 14. We can answer any questions you may have about the issue summaries or the agreement to participate on Tuesday's call.

Thank you for your cooperation, and we look forward to speaking with you next Tuesday.

Regards,

Judge Aaron Avila and Susan Gardinier Kimball, Senior Counsel to the Board

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Exhibit 3



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

C-14J

July 11, 2017

Elizabeth J. Hubertz
Assistant Director and Lecturer in Law
Interdisciplinary Environmental Clinic
Washington University School of Law
Campus Box 1120
St. Louis, Missouri 63130

RE: Veolia ES Technical Solutions, L.L.C.; EAB CAA Appeal No. 17-02

Dear Ms. Hubertz:

Thank you for your letter dated July 6, 2017, sent on behalf of the American Bottom Conservancy ("ABC"). In that letter you (on behalf of ABC) request to participate in the ongoing negotiations regarding the above-referenced matter.

As you know, in October 2014 the United States Environmental Protection Agency, Region 5 ("Region 5") issued a draft Clean Air Act Title V renewal permit for the Veolia ES Technical Solutions, L.L.C. ("Veolia") Sauget facility. As you noted in your letter, ABC submitted written as well as verbal comments on the draft Title V renewal permit. Region 5 responded to these comments in the Response to Comments document, which was issued along with the final Title V renewal permit in January 2017. Veolia has appealed the January 2017 Title V renewal permit to the Environmental Appeals Board ("EAB").

The parties to the permit matter (Veolia and Region 5, or "Parties") initially agreed to utilize the EAB's Alternative Dispute Resolution ("ADR") program. However, before mediation got underway, Region 5 notified the settlement judge that the Parties had reached a verbal settlement in principle and the Parties intended to continue pursuing settlement outside of the Board's ADR program. The matter was returned to the EAB's active docket on May 5, 2017. The Parties later obtained an extension to the initial stay which had been granted by the EAB. The stay of the permit appeal is now extended until November 22, 2017.

Region 5 has considered ABC's request to participate in the ongoing negotiations between the Parties and has decided to decline the request. The Parties have already negotiated a settlement in principle which does not include ABC as a signatory. It is worth noting that ABC is neither a party to nor an intervenor in the EAB permit litigation and ABC's involvement to settle the litigation is therefore not required. In addition, more detailed negotiations between the Parties are

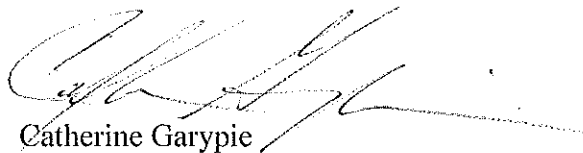
well underway. To add another party to the negotiations this late in the process would greatly complicate negotiations if not completely derail them.

However, not including ABC in the ongoing negotiations will not preclude ABC from participating in upcoming decision making regarding the Title V renewal permit. Region 5 anticipates issuing both a proposed settlement agreement and a proposed Title V renewal permit for public comment in the near future. See 42 U.S.C. § 7413(g); 40 C.F.R. § 71.11. Thus, ABC will have opportunity to comment on both the settlement agreement and the proposed Title V renewal permit terms and conditions, which the Parties are currently negotiating.

Region 5 appreciates the interest ABC has expressed in this Title V renewal permit and encourages ABC to participate in the upcoming public comment opportunities, which are expected to occur in late summer or fall of 2017. ABC may also wish to monitor the online EAB active docket for this matter, since status reports must be filed by the Parties on July 31, September 25 and November 13.

If you have any questions regarding this matter, you can reach me at garypie.catherine@epa.gov or (312) 886-5825.

Sincerely yours,



Catherine Garypie
Associate Regional Counsel

cc: Veolia ES Technical Solutions, L.L.C.
c/o Joseph M. Kellmeyer, Esq., (Thompson Coburn LLP)