

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

In the Matter of:)	
)	
VEOLIA ES TECHNICAL)	
SOLUTIONS, LLC)	CAA Appeal No. 19-01
)	
)	
Permit No. V-IL-1716300103-2014-10)	
Docket No. EPA-R05-OAR-2014-0280)	

**PERMITTEE VEOLIA ES TECHNICAL SOLUTIONS, L.L.C.'S
RESPONSE TO PETITION FOR REVIEW**

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I. INTRODUCTION

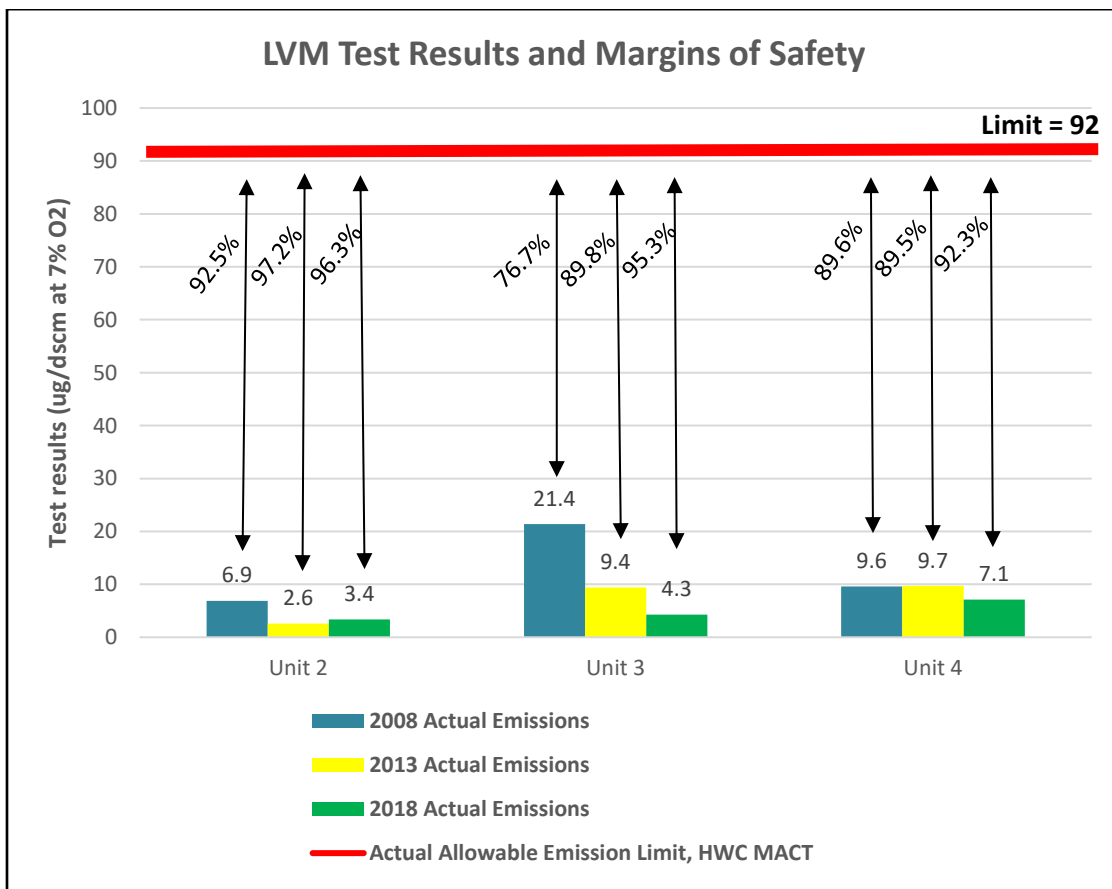
The 2019 Title V Permit to Operate (“2019 Permit”) issued to permittee Veolia ES Technical Solutions, L.L.C. (“Veolia”) ensures compliance with the Clean Air Act (“CAA”), is protective of human health and the environment, and must be upheld.¹ American Bottom Conservancy’s (“ABC”) Petition for Review filed on July 16, 2019 (“Petition”) seeks to overturn the decision of Region 5 of the U.S. Environmental Protection Agency (“Region 5”) to issue the 2019 Permit based on ABC’s claims that the 2019 Permit conditions will not ensure compliance with CAA emission limits for Low Volatility Metals (“LVM”) and Semi-Volatile Metals (“SVM”). ABC’s claims are wrong and its appeal must be dismissed. Region 5 issued the 2019 Permit on two fundamental bases: 1) the installation of carbon injection devices that will control mercury emissions and 2) Veolia’s LVM and SVM emissions have been demonstrated to be far below required limits and enhancements to Veolia’s feedstream analysis procedures will ensure this high-level of compliance and significant margin of safety. Region 5 fully and reasonably explained these foundational facts in its 2018 Statement of Basis and 2019 Response to Comments. ABC has failed to provide contrary evidence or otherwise show that Region 5’s decision-making process or decisions on the 2019 Permit were erroneous in any way.

Veolia’s emissions are governed by the Hazardous Waste Combustor Maximum Achievable Control Technology rule (“HWC MACT”).² Under the HWC MACT, compliance is demonstrated through comprehensive performance tests (“CPTs”). The HWC MACT requires that CPTs are carried out under worst case operating conditions such that a facility’s ability to

¹ See 2019 Permit, No. V-IL-1716300103-2014-IO, issued on June 17, 2019, Doc. ID: EPA-R05-OAR-2014-0280-0644.

² 40 C.F.R. Part 63, Subpart EEE.

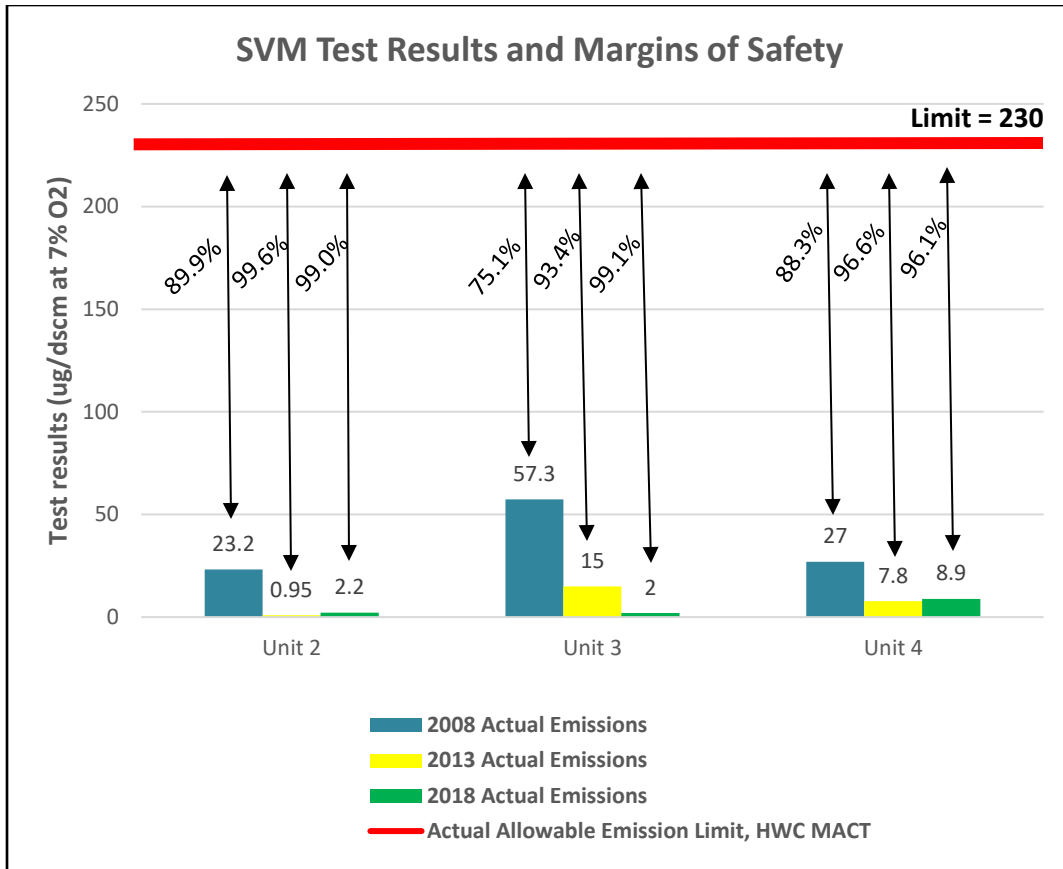
comply with the standards is pushed to the limit.³ These stress tests ensure that the facility’s every day operations will produce emissions far below the limits. The HWC MACT rule permanent replacement standards became fully effective in 2008⁴ and Veolia ran CPTs in 2008, 2013 and 2018. During these tests, Veolia fed LVM- and SVM-containing wastes into its three incinerators (Units 2, 3, and 4)⁵ at feedrates *many times* its normal feedrate. As shown in the two graphs below, in each instance, the CPTs proved that Veolia’s LVM and SVM emissions were magnitudes lower than the emission limits:



³ CPTs are run under operating conditions representative of the “extreme range of normal.” 40 C.F.R. § 63.1206(b)(2).

⁴ 70 Fed. Reg. 59,402 (Oct. 12, 2005).

⁵ Unit 1 was decommissioned in 1993.



Not only were the emissions low, the results represent a significant margin of safety *before the emission limit would even be reached*. The arrows in the graphs show the percentage margin of safety that is represented by each CPT result, which is achieved under worst case operating conditions. Further, this margin of safety has improved since the 2008 CPTs. Region 5 recognized the importance of this margin of safety in its permitting decision: “EPA has determined that it is unlikely that SVM and LVM emissions will spike to levels that are high enough to violate the applicable SVM and LVM HWC NESHAP emission limits, respectively.”⁶ A close look at the data fully supports Region 5’s conclusion. For example, the 2013 CPTs

⁶ 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, Doc. ID EPA-R05-OAR-2014-0280-0287 (“2018 SOB”) at 11.

demonstrated an average SVM emission from Unit 4 as 7.8 ug/dscm. The LVM emission limit is 230 ug/dscm. The 7.8 ug/dscm result means that 96.6% of the 230 ug/dscm limit remains. Put differently, the safety factor resulting from this test is approximately 29.5.⁷ This also means the feedrate that produced the 7.8 ug/dscm result could be doubled and the result would still retain a safety factor of 14.7:1. These safety factors can be calculated for each CPT result. Each one shows the wide margin of safety that each incineration unit achieves, even under extreme operating conditions that far surpass those encountered day-to-day at the facility.

The CPT results are, however, not the only layer of safety regarding LVM and SVM emissions. As Region 5 indicated: “[e]ven if large spikes . . . were to occur, given the margin of compliance demonstrated by the CPTs, EPA believes that the enhanced feedstream analysis procedures [(“FAP”)] in this [2019 Permit] . . . will be sufficient to assure compliance with the SVM and LVM emission limits.”⁸ Region 5 is correct that the enhanced FAP adds yet another layer of safety and the agency also accurately points out that the FAP and excellent CPT results work together to ensure that metals are detected and removed at multiple points in the process. This relationship, which results in a tremendous margin of safety, ensures that even in the most unlikely circumstance where the rigid processes of the FAP failed to quantify all of the metals in the waste feed, the emission standards would still be met. For instance, using the same calculations as above, Unit 2 achieved a result of 2.2 ug/dscm in the 2018 CPT with a safety factor of 104.5. With this result, if the FAP failed to quantify half of the metals present in the feed, the safety factor would still be 52.3. Further, Veolia’s operational practices add yet another layer of safety on top of the CPT results and enhanced FAP. As shown below in Section IV.C.3.,

⁷ $230 \text{ ug/dscm (SVM Limit)} \div 7.8 \text{ ug/dscm (CPT Result)} = 29.5 \text{ (safety factor)}$. The emission result would therefore need to be almost 30 times greater to rise to the limit.

⁸ 2018 SOB at 11.

Veolia consistently feeds a fraction of the amount of metals-containing waste that it is permitted to burn.

ABC ignores the 2019 Permit's multiple layers of protection against exceeding the LVM and SVM limits. It does not show how Region 5's decision to issue the 2019 Permit based on these layers of safety was unreasonable or unsupported, and its remaining attacks are outdated and superficial. ABC has not carried its burden and its Petition should be denied.

II. PROCEDURAL AND REGULATORY BACKGROUND

A. Summary of the Title V Process Prior to Veolia's 2017 Permit Appeal

Veolia operates three commercial hazardous waste incinerators in Sauget, Illinois, near St. Louis, Missouri. Each Veolia incineration unit is equipped with air pollution controls and monitoring devices, including specific equipment to control HCl emissions, mercury emissions, and multiple baghouses for particulate matter control.⁹ Veolia's facility is subject to the HWC MACT rule set forth in 40 C.F.R. Part 63, Subpart EEE, which controls the emission of hazardous air pollutants ("HAPs") from incinerators, cement kilns, and other combustors of hazardous waste. The emission limits developed under the HWC MACT, including those for metals—mercury, LVMs and SVMs¹⁰—are based on actual emissions achieved during performance testing using EPA-required methods.

The HWC MACT does not require continuous emission monitoring to demonstrate compliance for metals. Rather, Veolia and other hazardous waste incinerators are required to run CPTs to ensure compliance.¹¹ Emission levels achieved during CPTs are by design the highest

⁹ EPA-R05-OAR-2014-0280-0643 (2018 CPT Report describing pollution control equipment); LVMs and SVMs are removed by the particulate matter controls.

¹⁰ The LVMs are arsenic, beryllium and chromium; the SVMs are lead and cadmium.

¹¹ 40 C.F.R. § 63.1206(b)(2), § 63.1207.

emission levels a source emits under worst-case operating conditions.¹² A source must follow EPA Method 29 when conducting the CPTs to establish the source's HWC MACT operating parameter limits ("OPLs") for mercury, SVMs, and LVMs. Hazardous waste combustors use data developed from the CPTs to set OPLs that govern how much waste is fed into a unit and how that waste is burned. To comply with its OPLs, a source must also characterize the waste before it is burned to determine its chemical composition. 40 C.F.R. § 63.1209(c). The analysis process is directed by a feedstream analysis plan ("FAP"). The FAP provides the protocol for analyzing the waste so that the incinerator operator can burn the waste in accordance with the OPLs.

There are only three commercial HWC facilities located in Region 5: Veolia, Ross Incineration Services, Inc. ("Ross"), and Heritage-WTI, Inc. ("Heritage"). Publicly available data from CPTs run by both commercial and captive incinerators shows that metals emissions from Veolia's incineration units during CPTs are better than or in line with similar facilities. Of the three commercial HWCs facilities located in Region 5, Region 5 has direct Title V permitting authority over Veolia only—the others are permitted by Ohio EPA. Since the establishment of the HWC MACT regulations, Veolia has been in compliance with the MACT requirements and has never been assessed a penalty or been subject to any compliance-related orders. However, Veolia finds itself to be the only HWC in the country permitted directly by an EPA Region (as opposed to a state agency). Veolia believes it is helpful to discuss Veolia's permitting history in order for the Board to understand Veolia's current permitting status.

¹² CPTs are run under operating conditions representative of the "extreme range of normal." 40 C.F.R. § 63.1206(b)(2).

Veolia submitted its original application for a Title V operating permit to the Illinois Environmental Protection Agency (“IEPA”) in 1995.¹³ IEPA failed to issue a draft Title V permit until 2003 and ultimately never issued a final permit to Veolia. After multiple lawsuits by the Sierra Club *against EPA*, Region 5 finally took over permitting authority from IEPA for Veolia in 2006 as a part of a settlement agreement. Region 5 issued Veolia’s first Title V permit in September of 2008, 13 years after Veolia submitted its original application. Veolia’s September 2008 Title V permit did not include OPLs for metals. As a result, over the next four years, at Region 5’s direction, Veolia submitted several applications for significant modification to add OPLs for metals to its permit. During this timeframe, Veolia complied with the HWC MACT by filing and operating under a Notification of Compliance (“NOC”) containing OPLs using its most recent CPT data.¹⁴ Region 5 never took action on these applications. Eventually, in December of 2012, Veolia withdrew its request to add metals OPLs, pointing out to Region 5 that Veolia’s deadline for applying to renew its Title V permit was April of 2013 and Veolia was required to perform CPTs in September of 2013, which would produce new OPLs, including OPLs for metals.

In January of 2013, Region 5 moved to formally reopen Veolia’s permit under 40 C.F.R. § 71.7—even though the permit was set to expire in less than 9 months. Region 5’s stated purpose for the reopening was to add metals OPLs, and two entirely new conditions to Veolia’s permit: (1) a more stringent and onerous FAP and (2) a first-of-its-kind requirement that Veolia install a Cooper Environmental Xact 640 multi-metals continuous emissions monitor (a “multi-metals CEMS”) on each of its three incinerator stacks. Veolia filed extensive comments and

¹³ A complete summary of the procedural and regulatory history may be found in Veolia’s 2014 comments and documents incorporated therein. EPA-R05-OAR-2014-0280-0111.

¹⁴ *See* 40 C.F.R. § 63.1210(d).

participated in the public hearing. Among concerns Veolia expressed was that the only commercially available multi-metals CEMS, the Cooper Xact 640, is not Method 29 compliant and has never been proven to work on incinerators such as those located at Veolia. Non-Method-29-compliant multi-metals monitors such as the Cooper Xact 640 cannot be used directly for compliance or indirectly to establish OPLs because pursuant to the HWC MACT Veolia must demonstrate compliance through Method-29-compliant CPTs. After the close of the public comment period, Region 5 abandoned its efforts to reopen the permit.

As required by the HWC MACT, Veolia conducted and passed all of its CPTs in 2013 and timely applied to renew its Title V permit. In October 2014, Region 5 issued a draft Title V permit (“2014 Draft Permit”) for public comment that included the requirements from the reopening for an enhanced FAP and the installation of multi-metals CEMS on each of Veolia’s three incineration units. Veolia timely submitted comments in December of 2014.¹⁵ After the close of the comment period, Veolia and Region 5 entered into lengthy negotiations where Veolia offered to install additional pollution control equipment and implement many of the additional enhanced FAP provisions. Veolia met with the Deputy Regional Administrator of Region 5 on several occasions during this period and believed a settlement was within reach that would achieve Region 5’s goals. However, Region 5 abruptly negated the gains made during these negotiations when on January 18, 2017, Region 5 issued the 2017 Title V permit (“2017 Permit”), which required Veolia to install multi-metals monitors and implement new FAP provisions.

¹⁵ EPA-R05-OAR-2014-0280-0111.

B. Veolia's 2017 Permit Appeal and Settlement with Region 5

On February 15, 2017, Veolia filed a petition with the Environmental Appeals Board (“Board”) seeking review of the 2017 Permit.¹⁶ Veolia’s petition for review asserted that EPA’s 2017 permit decision was flawed and invalid because:

- at the time of issuance, the 2017 Permit failed to assure compliance with all applicable requirements at the time of the permit issuance as required by 40 C.F.R. § 71.6(a)(1);
- the new compliance and monitoring scheme contained in the 2017 Permit required an enhanced FAP and multi-metals monitors not required by the HWC MACT; and
- Region 5’s decision was constitutionally inadequate as applied to Veolia because Region 5 failed to give Veolia an adequate opportunity to contest the alleged violations of the CAA that Region 5 used to justify 2017 Permit, including the enhanced FAP and multi-metals monitors.

Shortly after filing its petition, Veolia filed a motion to stay the 2017 Permit in its entirety pending resolution of the matter and the Board inquired as to whether EPA and Veolia were agreeable to participate in Alternative Dispute Resolution (“ADR”). The parties agreed to consider settlement negotiations albeit outside the Board’s formal ADR process. The Board therefore stayed all proceedings including resolution of Veolia’s motion to stay the 2017 Permit in its entirety pending the outcome of settlement negotiations.¹⁷

For over a year—from February 2017 until March 2018—the parties spent countless hours and significant amounts of resources engaged in hard fought negotiations to reach a settlement. The settlement negotiations included formal efforts through counsel as well as direct meetings between the parties.¹⁸ These arduous efforts eventually bore fruit. On March 28, 2018,

¹⁶ EPA-R05-OAR-2014-0280-0280, CAA Appeal No. CAA 17-02, Feb. 15, 2017 (“2017 Appeal”).

¹⁷ *In re Veolia ES Technical Solutions, L.L.C.*, CAA Appeal No. 17-02 (EAB Mar. 15, 2017) (Order Staying Proceedings to Allow Parties to Participate in ADR).

¹⁸ ABC mentions that Veolia met with former Administrator Scott Pruitt in Washington D.C. on March 27, 2017 as part of its efforts to resolve issues regarding its Title V permit. This meeting was one of

EPA and Veolia finalized a settlement agreement and attached a draft permit (“2018 Draft Permit”) to the settlement which both parties agreed was protective and consistent with the mandates of the CAA.¹⁹ Specifically, the 2018 Draft Permit:

- incorporated requirements from the 2018 Settlement Agreement and a preconstruction permit issued by IEPA on January 17, 2018 that called for the installation of new activated carbon injection systems (“ACI systems”) on Units 2 and 3²⁰ to control mercury emissions;
- removed from the January 2017 Permit the requirement for multi-metals monitoring devices; and
- revised the 2017 Permit’s feedstream analysis procedures consistent with the 2018 Settlement Agreement, including the addition of provisions that distinguish sampling and analytical procedures that apply to feedstreams that are likely to contain metals (suspect wastes) from those that apply to feedstreams that are unlikely to contain metals (non-suspect wastes).²¹

many meetings that Veolia had with any local, state and federal officials who were willing to listen to what Veolia believed was an unjust situation. For several years, Veolia has been dealing with Region 5’s attempt to require Veolia to install, via its Title V permit, very expensive, unverified monitors on its stacks that were available solely from a single supplier. Veolia believed if this experimental system was EPA’s preferred monitoring system, it should be applied equally and consistently to the entire industry through appropriate rulemaking. See EPA R05-OAR-2014-0280-0111 at VES019550 (including citation to underlying documents). Absent such rulemaking, Veolia believed that it alone was being unfairly singled out to essentially pay for the costs associated with attempting to develop this sole-sourced experimental system. Veolia was justified in believing it was being singled out as it was told by one Region 5 official “someone’s got to be first.” EPA-R05-OAR-2014-0280-0112 at VES008382. Veolia further believed EPA’s actions in singling Veolia out from its competitors would cause Veolia to be less competitive in the hazardous waste incineration industry and potentially endanger its existence. Therefore, Veolia made no secret of the fact that it employed a lobbyist through which Veolia lawfully contacted and met with an assortment of elected officials and senior staff at EPA. Each time Veolia stressed that this new monitoring should be applied consistently through appropriate rulemaking. Veolia also met on several occasions with Regional Administrators at Region 5 to discuss settlement related to Veolia’s Title V permit. The meeting with former Administrator Pruitt was no different than these prior high-level meetings that occurred during the prior administration and the content of the Pruitt meeting focused on Veolia’s request that these new standards be applied consistently across the industry. Now that Mr. Pruitt’s short tenure has attracted negative attention from the press, for issues wholly unrelated to Veolia, ABC’s is attempting to use this attention to gain an advantage with regard to their Petition. As Region 5 noted in its Response to Comments there was “nothing unusual” about Veolia meeting directly with EPA, without counsel, in an attempt to settle the 2017 Appeal and make its plea for consistency known. ABC’s attempts to create negative inferences to the contrary should be disregarded.

¹⁹ EPA-R05-OAR-2014-0280-0277.

²⁰ Construction Permit #17120004, EPA-R05-OAR-2014-0280-0281. Veolia previously installed ACI controls on Unit 4.

²¹ See 2018 SOB, EPA-R05-OAR-2014-0280-0287, at Section 2 for a complete listing of changes made.

From Veolia’s perspective, a significant factor in the settlement was that Veolia no longer was required to install multi-metals monitoring devices that were experimental in nature, frequently inoperable, and known to provide inconsistent and unreliable results due to design flaws. Further, testing in the FAP process that was expensive, duplicative, unnecessary and unsafe was eliminated. Similarly, in its Response to Comments Region 5 stated that it was motivated to settle with Veolia because “EPA determined that the additional mercury control devices that Veolia voluntarily agreed to install, which would be operated permanently and continuously, would achieve far greater reductions in emissions than may have resulted from operation of the temporary continuous emissions monitoring devices.”²² While not required by the HWC MACT, because Veolia is already compliant with the MACT mercury emission standards, the ACI systems minimize mercury emissions by achieving a removal efficiency of 90% or better.²³ Further, although not required, Veolia also agreed to enhancements to Veolia’s FAP to alleviate any concerns related to LVM and SVM.

After entering into the settlement and with Region 5’s full knowledge and encouragement, Veolia applied to IEPA for issuance of the construction permit necessary to

²² Response to Comments on EPA’s Draft Revised Air Pollution Control Title V Permit to Operate No. V-IL-1716300103-2014-10, June 2019 (“2019 RTC”) at 68. EPA also acknowledged that it “did not require that Veolia install new mercury control devices on the two incineration units that did not have mercury control devices . . . because EPA did not believe it had the authority to demand those control devices under [Title V].” *Id.* ABC, in its footnote 13, points to a 2010 Region 5 email and erroneously claims that Veolia had ACI systems available for installation since 2010, but declined to install them. Petition at 6 n.13. ABC mischaracterizes this email. A closer look shows that Veolia was willing to install ACI, but that several issues needed to be worked out, including obtaining the necessary construction permits from IEPA and how installation would impact the permit issues being discussed between Region 5 and Veolia. Veolia never declined to install ACI systems, it just needed to make sure it knew how to go about it and what impact installation would have on the negotiations with Region 5. This is evidenced by the Region 5 author’s note at the end of the email that states: “[w]e ended the call with Doug’s [Doug Harris, Veolia General Manager] concern that he doesn’t know what he should be doing at this point.” EPA-R05-2014-280-0459 (documents attached to ABC Nov. 5, 2018 Comments).

²³ In fact, during the 2018 CPT, Unit 2 and Unit 3 achieved a removal efficiency greater than 99%. *See* EPA-R05-OAR-2014-0280-0643.

install the ACI systems and, ultimately, modified its FAP. On July 13, 2018, Region 5 issued the 2018 Draft Permit for public review and comment. By the time Region 5 received all of the public comments to the 2018 Draft Permit, Veolia was already complying with the modified provisions pertaining to the ACI systems found in the 2018 Draft Permit. EPA responded to the public comments and the 2018 Draft Permit was issued as a final permit on June 17, 2019 (“2019 Permit”).

C. Issuance of the 2019 Permit and ABC’s Appeal

On July 17, 2019, ABC filed its Petition with the Board challenging the 2019 Permit. The Petition attempts to eviscerate any value the settlement had to the parties. ABC challenges:

- EPA’s removal of the requirements for multi-metals monitoring devices which had been found in former Condition 2.1(D)(1)(i) of the Draft 2017 Permit; and
- Modification of Condition 2.1(D)(4)(d)(ii) which contained certain provisions of the enhanced FAP which had been either modified or deleted.

It is important for the Board to recognize that the multi-metals monitoring devices were removed from the 2019 Permit because Veolia voluntarily agreed to install the ACI systems and agreed to an enhanced FAP. ABC’s challenge and requested remedies are prejudicial to Veolia because Veolia has already spent considerable resources to install and operate the new ACI systems in reliance on the settlement. In addition, Veolia is now legally required to continue to operate these systems and it would be absurd and economically infeasible to remove them from the system. Put simply, granting ABC’s requested relief and reinstating the permit conditions would unfairly deprive Veolia of the benefit of its settlement agreement with Region 5. Upending the settlement between Veolia and Region 5 also discourages parties from settling appeals, a result contrary to EPA’s policy. *See In re Wheland Foundry*, RCRA Appeal No. 93-2 (EAB Dec. 22, 1993) (Order setting aside and vacating initial decision) (it is “the policy of the U.S. Environmental Protection

Agency to encourage settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the [applicable act]). Veolia moved to intervene in this appeal and on July 26, 2019, the Board granted Veolia's motion.

III. THE BOARD'S STANDARD OF REVIEW

Part 71 provides that the Board may grant review if a person files a petition showing that the permit condition in question is based on a "finding of fact or conclusion of law which is clearly erroneous" or is based on "an exercise of discretion or an important policy consideration" which the Board, in its discretion, should review." 40 C.F.R. 71.11(l)(1)(i). "The Board grants such review 'only sparingly,' and 'most permit conditions should be finally determined at the Regional level.'" *In re Peabody W. Coal Co.*, 15 E.A.D. 757, 763 (EAB 2013) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). As set forth in detail below, ABC has failed to show that Region 5 made any erroneous findings of fact or conclusions of law, let alone any that rise to the level of "clearly erroneous." Further, Region 5's technical decisions concerning applicable monitoring and sampling protocols at issue in the 2019 permit do not warrant review by the Board for any policy or discretion-related issues. Rather, when technical issues are the basis of the request for review "the Board assigns a particularly heavy burden to the petitioner" to demonstrate that review should be granted. *See In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *see also In re Tucson Electric Power*, 17 E.A.D. 675, 690 (EAB 2018) (noting that "technical issues such as the adequacy of the compliance monitoring requirements" for NO_x emissions were subject to the elevated standard). Thus, ABC has to overcome the dual high bars of "clearly erroneous" and deference to Region 5 over technical issues in order to make its required showing. The ABC Petition fails on both standards.

ABC also states that the Board’s review should be governed by *FCC v Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The rule in *Fox* is inapplicable here and cannot amend or supplant the “clearly erroneous” standard set forth in Section 71.11. *Fox* dealt with the FCC’s change in policy concerning the use of foul language on broadcast television networks. 556 U.S. at 506-07. The Court set forth a multi-factor test to determine the reasonableness of the change in policy. *Id.* at 514-15. The *Fox* test has never been applied to a permit case and, when given the opportunity, the D.C. Circuit declined to use the test to determine whether a change in policy over a coal mining permit was unreasonable. *See Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 726 (D.C. Cir. 2016) (declining to “resolve the question of whether a more detailed explanatory standard [as set forth in *Fox*] applies here because . . . the EPA’s explanation [was] adequate even assuming arguendo that it was required to supply a more detailed justification.”). Neither the courts nor the Board have ever used *Fox* as a standard of review for assessing an EPA permit decision and there is no basis to do so here. Moreover, even if such a standard were applicable, ABC would fail in its showing because Region 5 supplied a detailed and reasonable justification for the 2019 Permit in its Response to Comments and Statement of Basis.

IV. ARGUMENT

A. The Factual Basis for the 2019 Permit Fully Supports the 2019 Permit

The 2019 Permit is supported by substantial factual evidence and ABC’s argument is stuck in the past. ABC’s lead heading states that the “Factual Basis for the 2017 Permit Does Not Support the Conclusions of the 2019 Permit.”²⁴ ABC’s statement is mostly true—the **2017** record is not the basis for the **2019** Permit. Nor should it be. Rather, and axiomatically, the **2019 record** is the support for the **2019 Permit**. ABC would like the Board to focus solely on the

²⁴ Petition at 15.

2017 permit decision and dismiss Region 5's assessment of the important administrative actions and new facts that arose after 2017. This is because ignoring those actions and new facts is the only way ABC can argue that the 2019 Permit is unsupported.

The 2017 record does not take into account Veolia's appeal, the settlement negotiations, the agreement to install ACI systems to control mercury, and Region 5's rational and reasoned reassessment of the underpinnings of requiring more stringent monitoring for just LVM/SVM when mercury is no longer an issue. Region 5 highlighted these actions and developments as the factual basis for the 2019 Permit. ABC's arguments either entirely ignore or dismiss these actions and therefore present a wholly incomplete and biased view of the factual record for the 2019 Permit. The Board must look to the record as a whole when making its decisions and must do so here despite ABC's efforts to persuade the Board to look no further than the 2017 permit decision. *See In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 130 (EAB 2016) ("the Board bases its decisions in permit appeals on review of the administrative record in its entirety"). When the Board considers the entire record for the 2019 Permit, the only conclusion the Board can reach is dismissal of the Petition.

1. Veolia contested the facts presented by ABC as the basis for the 2017 Permit and Region 5 was right to reevaluate them as support for the 2019 Permit

ABC lists seven facts that it claims formed the basis of Region 5's conclusion in the 2017 Permit that Veolia's OPLs for LVM/SVM were not sufficient to assure compliance.²⁵ ABC then states that the 2019 Permit "rests on these very same facts, but contains what EPA describes as a 'reevaluation'" and argues that Region 5's reevaluation was flawed because Region 5 did not assert any new facts or studies in support of its reevaluation.²⁶ ABC's assertions are contrived

²⁵ Petition at 15-17.

²⁶ Petition at 17.

and meritless. The alleged “facts” to which ABC refers are assertions that have been contested between Veolia and Region 5 for years.²⁷ While these alleged facts and others were included in the 2017 Response to Comments, they were by no means undisputed as a basis for the 2017 Permit and it is disingenuous for ABC to state that these are empirical facts about which Region 5 simply changed its mind without justification. A closer look at each of the allegations shows Region 5 was right to finally reevaluate them as a part of the 2019 permit decision in light of the 2017 Appeal and once Region 5 and Veolia agreed to the installation of mercury controls, which changed the context and focus of the overall permit.

a. *2006 CPT LVM Exceedance*

The 2006 CPT LVM exceedance was a true outlier because a retest less than 30 days later showed that the exceedance was not representative of normal operating conditions. Veolia performed a CPT on incineration Unit 3 on May 10th and 11th of 2006. Veolia’s stack testing consultant, ENSR, recorded a compliant run for arsenic, beryllium, and chromium (the LVM metals) at the outset of the test, with the combined metals total coming in well-below the standard of 97 micrograms per dry cubic meter in effect at that time.²⁸ However, over the course of the other two runs, the arsenic level substantially increased:

May 2006 CPT Test Results for LVM²⁹				
LVM	Run 1 (ug/dscm)	Run 2 (ug/dscm)	Run 3 (ug/dscm)	Average
Arsenic	6.14	126	557	230
Beryllium	0.07	0.05	0.06	0.06
Chromium	12.05	14.2	32.3	19.5

²⁷ 2014 Veolia Comments EPA-R05-OAR-2014-0280-0111 at VES 019503-019522, VES 019574-019589 (including citations to underlying documents).

²⁸ The HWC MACT contains both interim and permanent standards. The interim standard for LVM in effect at the time of the 2006 CPT on Unit 3 was 97 ug/dscm (the SVM limit was 240 ug/dscm). 40 C.F.R. §63.1203(a)(4). The permanent standard of 92 ug/dscm for LVM (230 ug/dscm SVM) took effect on October 14, 2008. *See* 40 C.F.R. §63.1219(a)(4); 70 Fed. Reg. 59,402, 59,412 (Oct. 12, 2005).

²⁹ 2006 CPT Test Report, EPA-R05-OAR-2014-0280-0112 at VES 002297-002441 at 3-7.

The inconsistent results for arsenic raised concerns regarding the validity of the test results since the waste feeds during the testing were consistent for all three runs. Specifically, the arsenic feedrates of the waste feeds were 0.02, 0.02, and 0.03 lb/hr for the three runs, respectively. The inconsistency of the arsenic results among runs, as well as the inconsistency with historical LVM emission performance, prompted Veolia and ENSR to conduct an investigation to assess possible causes and/or sources of contamination. Veolia and ENSR's review involved:

- assessment of sample train clean-up and preparation procedures;
- evaluation of the sample port access and the procedures used to prepare the port for sampling;
- investigation of potential sampling anomalies (i.e., observations of filter, sample train and procedures);
- analysis of whether there was sample contamination at the laboratory (duplicate samples were analyzed at a separate laboratory); and
- a determination of whether equipment issues may have caused non-representative particulate matter containing high arsenic to be sucked into the sample train.

The investigation found rust and scale deposits on the sampling filters that did not come from the combustion process. Based on this evidence, it was likely that arsenic-containing scale from inside the stack had become dislodged during the initial run of the CPT and subsequently contaminated the sample train and sampling media, causing a non-representative result.

In light of the May CPT results and the results of the investigation, Veolia proceeded to conduct another CPT in June 2006. In preparation for the test, ENSR and Veolia thoroughly cleaned the sample ports and the area around the ports. A rubber-guide sleeve was also fabricated for sample probe insertion into the stack to prevent the probe from impacting the wall

of the sample port and to deter the possible loosening and up-take of rust and scale into the stack gas sample. Incinerator 3 emissions test results for the June 2006 runs for LVM were:

June 2006 CPT Test Results for LVM³⁰				
LVM	Run 1 (ug/dscm)	Run 2 (ug/dscm)	Run 3 (ug/dscm)	Average
Arsenic	3.4	1.9	2.98	2.8
Beryllium	0.00	0.04	0.00	0.01
Chromium	6.17	1.94	6.40	4.84

The emission results from June 2006 tests showed consistent performance among runs and full compliance with the LVM emissions limits. The results also confirmed that contamination of the stack gas sample from rust/scale was the likely source of elevated arsenic levels. There were no visible indications of rust/scale on the filters during the June 2006 tests and the average arsenic emissions were substantially lower than the May test results. Subsequently, IEPA and Region 5 conducted their own investigation of the May 2006 results, but took no further action in light of the June 2006 retest that showed excellent compliance with the standard. Veolia has since demonstrated compliance with the LVM standard through CPTs conducted in 2008, 2013, and 2018. This record of compliance, a thorough and quick investigation of the May 2006 incident that was rectified only a month later, and the June 2006 results that demonstrated compliance with the LVM standard shortly after the May exceedance, all support Region 5's determination that this was an anomalous result that did not support enhanced monitoring.³¹

b. *2008 CPT SVM Test Results*

No exceedance of the applicable standard occurred during the 2008 CPT test and ABC's statement that it did is patently false. In August 2008 Veolia retained a contractor to conduct a

³⁰ 2006 CPT Test Report, VES 002297-002441 at 3-7.

³¹ 2018 SOB at 11.

metals performance test for its Unit 2 as required under 40 C.F.R. §63.1207 of HWC MACT. The performance test was conducted during the week of August 11th and a retest occurred during the week of September 8th. All of the results used for compliance showed that LVM and SVM emissions were below the limits imposed by the interim HWC MACT standards.³² However, the total SVM results for Unit 2 were not representative of normal performance for Unit 2 and came close to the emission limitation. Veolia determined that an inline spare baghouse on Unit 2, that was supposed to be offline during the test, had not been completely isolated from the system and that it was the cause of elevated emissions during the testing. The baghouse outlet damper was closed, but it did not seal completely. The offline Unit 2 baghouse was undergoing maintenance which included the removal of several fabric filters in the module.³³ Upon learning of the results, Veolia retested Unit 2 in September after the off-line baghouse was fully isolated from the system by installing a blank flange plate in the duct. The total SVM and LVM results from these tests met the emission standards for the HWC MACT regulations by a wide margin and were indicative of the normal operation of Unit 2. Since the high SVM value was recorded, Veolia has run three additional CPTs: the September 2008 retest, 2013 and 2018.³⁴ Each time the SVM emission results showed a wide margin of compliance. Region 5 rightly took a closer look at these facts and concluded that the initial 2008 SVM results were an anomaly.

³² *See supra* note 28.

³³ Unit 2's pollution control system is designed with four baghouses. The design allows maintenance to be performed on one baghouse while three are still operating.

³⁴ *See infra* Section IV.C.2., which sets forth the 2008, 2013, and 2018 CPT results.

c. *Allegations Regarding the 2009 Ambient Air Monitoring Report*

ABC also points to an isolated, elevated arsenic concentration reading from ten years ago that an experimental Xact 640 ambient air monitor manufactured by Cooper Environmental captured nearly two miles away from the Veolia facility.³⁵

ABC cites to page 42 of a technical report³⁶ and alleges that the “‘authors’ analysis of publicly available data determined that Veolia was the probable source of the arsenic...”

However, the technical report referenced by ABC does not support ABC’s statement. The referenced portion of the report states:

April 13, 2009 Arsenic Spike. On April 13, 2009, a two-hour average arsenic concentration of 2,345 ng/m³ was monitored from 10AM to 12 noon, with a likely uncertainty of about 120 ng/m³ (~5%). This data appears to be of reasonable quality. Periodic audits of thin film standards and flow rate indicate uncertainties of less than 5%. April 13th was about half way into the study period in which less than two percent drift in arsenic measurements was observed; calibration drift at that time was only about one percent. The concentration of arsenic was so high that it dominated the elemental XRF spectrum, and there is no possibility of a spectral interference problem. It also clearly indicated that the arsenic represented well over 90% of the measured elemental mass of deposit on the filter. However, the Xact is not sensitive to elements like C, N, O, Na, Mg, Al and Si.

The concentration exceeds the concentration that OSHA recommends should never be exceeded by any adult worker for more than 15 minutes. The arsenic exposure of the monitored population during this hit is equal to about 4% of the arsenic exposure they would receive if exposed to the one-in-a-million concentration (0.2 ng/m³) for 70 years. The tailing off of the arsenic concentration after the peak measurement and the associated meteorology strongly suggests that these arsenic emissions were occurring well before the Xact’s first measurement, and populations to the west and southwest of the source/monitor may have been exposed to similar high arsenic concentrations.

EPA-R05-OAR-2014-0280-0257 at 42. The St. Louis Air Report *never* attributes a source for the arsenic allegedly recorded by the Xact 640.

³⁵ Petition at 16.

³⁶ Document ID EPA-R05-OAR-2014-0280-0257 in footnote 49. ABC refers to this technical report as the St. Louis Air Report and Veolia will therefore also refer to this technical report as the St. Louis Air Report.

In 2010, John A. Cooper, of Cooper Environmental and one of many individuals involved in drafting the St. Louis Air Report, presented a hypothetical example on how to develop a multi-metals, fence-line monitoring plan for fugitive emissions in some marketing materials for his experimental Xact 640 multi-metals monitor. Document ID EPA-R05-OAR-2014-0280-0104, Att. F at 64 (“Marketing Materials”). Cooper thereafter attached the Marketing Materials as Exhibit F to his 2014 comments on Veolia’s permit.

The Marketing Materials used the isolated, elevated arsenic concentration reading that its experimental equipment allegedly recorded on April 13, 2009 as a starting point to begin a discussion regarding how one would hypothetically go about establishing a plan to determine a source. *Id.* The Marketing Materials made numerous assumptions including that the Xact 640 properly recorded a spike; if there was a spike, it originated from one source; and, the most obvious and, for purposes of this discussion the most important, that Veolia was a *hypothetical* source. In fact, the Marketing Materials specifically state, “[i]n this example, the source of the arsenic emission is unknown, but it is hypothesized to be intermittent fumigations by stack emissions from a hazardous waste incinerator.” *Id.* No comprehensive source apportionment study was ever conducted and therefore no fully confirmed source was ever identified. *Id.* at 66, 70. Further, the St. Louis Air Report and the Marketing Materials recognized the following:

- the spike was transient and an isolated occurrence (Marketing Materials at 66; St. Louis Air Report at 7, 41-42);
- the area where the spike occurred is highly industrialized (Marketing Materials at 66; St. Louis Air Report at 20-21, 41);
- the airshed in which the spike occurred is highly industrialized and strongly influenced by a lead smelter south of St. Louis (Marketing Materials at 68; St. Louis Air Report at 7);
- heavy traffic, railway operations and numerous industrial operations exist in the area including a zinc smelter, a marine shipping terminal, a number of large chemical

corporations, mid-sized manufacturers, and an oil company supply terminal (Marketing Materials at 68-69; *see also* St. Louis Air Report at 27-32, 41-42);

- the area is home to the Dead Creek federal Superfund site which was in the process of dredging and remediation for elevated metals, volatile organic compounds and PCBs (Marketing Materials at 68);
- EPA's Toxic Release Inventory lists over 1,099,641 lbs of total hazardous, on or off-site disposal or other releases in the area near where the spike was recorded (Marketing Materials at 82; *see also* St. Louis Air Report at 20-21, 41); and
- other viable source candidates exist (Marketing Materials at 69; St. Louis Air Report at 19-21, 41).

The Marketing Materials were based on a hypothetical. Given the numerous potential point sources for the arsenic as evidenced by the St. Louis Air Report and admitted in the Marketing Materials, no serious effort was made to determine or exclude any particular point source. This information and the allegations included in it concerning Veolia are unverified and to a large extent fabricated as a way to sell monitoring equipment. ABC's attempts to continue to associate this with Veolia are disingenuous and should be disregarded.

d. *Measurable differences between the metal emissions reported in the 2006, 2008 and 2013 CPT Metals Results*

For purposes of its appeal, ABC refuses to recognize that Region 5 has always required Veolia to test its three incineration units separately, believing that each would have significantly different emissions. Similarly, Region 5's view on this technical point is set forth in detail in a memorandum from Charles Hall, an environmental engineer with Region 5, which discusses, in relevant part, Veolia's CPT test plan and Region 5's rejection of Veolia's request to use data from Unit 2 to establish OPLs for Unit 3:

Veolia wanted to use test data from Incinerator #2 to demonstrate compliance and establish OPLs for Incinerator #3...[however] Veolia has not yet demonstrated to EPA's satisfaction that Incinerators #2 and #3 are identical: Incinerator #2's baghouse has four modules, and Incinerator #3's baghouse has three modules. This difference may affect the emissions of dioxin/furan, mercury, PM, SVM,

LVM, and HCL/CL2 ... hazardous waste incinerators burn wastes that can vary widely in their heat content and elemental composition. Waste streams can vary from one hour to the next. Liquid wastes can separate into two or more phases. Consequently, EPA cannot reasonably assume that a hazardous waste incinerator – especially one such as Veolia that accepts hazardous waste from numerous generators – burns a homogenous waste stream.³⁷

Thus, Region 5 has always required Veolia to test Units 2 and 3 separately.

Similarly, Region 5 has always required that Unit 4 be tested separately due to its carbon injection control system which makes it difficult to compare Unit 4's emissions to those of the other units.³⁸ Test results that show different emissions of mercury from Units 2 and 3, despite nearly identical mercury feedrates to Units 2 and 3 are consistent with Region 5's pre-existing beliefs and ABC should not view this reality as a "deficiency" simply because ABC has not historically been a part of the conversation.

The facts are that Veolia's CPT results have always demonstrated compliance with the HWC MACT. Whether in 2006, 2008, 2013 or 2018, this demonstrated compliance has occurred while generating emissions under the extreme range of normal, i.e., worst case scenario, operating conditions for the particular combination of wastes incinerated and combustion conditions at the time of the test. Region 5 acknowledges that the emission levels achieved during compliance tests are typically the highest emission levels a source emits under reasonably anticipatable circumstances. *See* 69 Fed. Reg. 21,197, 21,218 (April 20, 2004); *see also* 40 C.F.R. §§63.1206(b)(2), 63.1207(f)(1), (g)(1). These worst case scenario operating conditions engender inherent variability, but despite this inherent variability, Veolia has demonstrated full compliance with all standards. Moreover, both Region 5 and Veolia have always complied completely with all regulations applicable to Veolia's test plans in order to ensure the accuracy

³⁷ EPA-R05-OAR-2014-0280-0112 at VES 007534-007535.

³⁸ *Id.* at VES 007533-007536.

of Veolia's CPT results. Veolia's CPT results have been validly obtained through strict compliance with the HWC MACT and under the scrutiny of Region 5; ABC cannot credibly assert that the CPT testing was not performed under representative conditions due to variability in the results.

e. *Veolia's Identification of Metals*

ABC alleges that Veolia is undercounting metals by "orders of magnitude."³⁹ ABC's claim is not supported by the evidence. Since the effective date of the Incinerator MACT Rule, Veolia has had a metals testing protocol in place that has been provided to EPA, along with a Waste Analysis Plan ("WAP") (required by RCRA) and a FAP required under the CAA. Veolia's testing protocol along with the WAP and FAP determines if metals analysis needs to be conducted and how often, based on the generator's provided waste profile sheet, including metal analysis, SDSs, and additional generator-provided information. Under the revised FAP in the 2019 Permit, Veolia recertifies the generator's provided waste profile sheet every two years, and some are recertified every year.⁴⁰ The facility's on-site laboratory is equipped with three Inductively Coupled Plasma units and four mercury analyzers that support this effort. These instruments are continually upgraded to keep up with improved technology/software. These protocols and plans, along with the on-site laboratory's capabilities, ensure that the wastes being received are properly evaluated and the metal concentrations are correctly determined pursuant to the waste acceptance procedures of the Permit. In addition, the 2019 FAP requires Veolia to assign metals concentrations to waste streams even if those wastes ***are not expected to contain metals*** (based on RCRA waste code and generator information) ***and*** analytical results show that ***no metals are present***. Under Condition 2.1(D)(4)(d)(ii)(B)(III), even if there is no evidence that

³⁹ Petition at 17.

⁴⁰ See 2019 Permit Conditions 2.1(D)(4)(d)(ii)(B)(I)(aa) & 2.1(D)(4)(d)(ii)(B)(III)(aa).

a waste stream contains metals, Veolia must still assume that the waste contains metals at one-half the applicable detection limit for the analytical test. Similarly, under Condition 2.1(D)(4)(d)(ii)(B)(I), wastes that are suspected to contain metals based on waste codes and other information, but are shown not to contain metals through analytical testing, still must be assigned a full detection limit concentration. Finally, Veolia charges its customers more to handle metals-containing wastes; therefore, there is an economic incentive for Veolia to accurately determine if a waste stream contains metals. Contrary to ABC's assertions, Veolia does not undercount metals in its waste streams.

f. *Veolia's Reliance on Generator-Supplied Information Pursuant to RCRA*

ABC claims that Veolia utilizes “unreliable and inaccurate sources” of information to identify metals in its feedstreams.⁴¹ As set forth in more detail below, this is patently false. Veolia characterizes each shipment of waste it receives through sampling and analysis or by using other approved sources of information, including generator knowledge, SDSs, technical information and reference documents. *See* 40 C.F.R. § 264.13. Except for those waste streams that have exemptions defined in Veolia's FAP, Veolia analyzes all wastes that are suspect for metals—i.e., if the process generating the waste, the waste type, the waste characteristics, or the history of facility indicate that metals maybe present. These methods are consistent with the practices of the other commercial hazardous waste incinerators in Region 5.⁴² ABC's alleged “fact” is really an allegation that rests on old, unproven and unsubstantiated claims concerning Veolia's FAP and waste-handling procedures. These accusations have been addressed many times over and, as ABC ultimately admits, the 2019 FAP is more restrictive and requires more

⁴¹ Petition at 17.

⁴² *See* Ross, Waste Characteristics and Waste Analysis Plan (April 2013) at EPA-R05-OAR-2014-0112 at VES 016106-016293 & Heritage, Waste Characteristics and Waste Analysis Plan (Sept. 18, 2014) at EPA-R05-OAR-2014-0112 at VES 016295-016537.

sampling and analysis than Veolia's prior FAP. As such, ABC's resurrection of old allegations is wholly irrelevant.

g. *Relationship between LVM feedrates and emission rates*

The metals contained within the waste streams Veolia receives exist in different physical and chemical states. At times, the metals are combined as parts of various compounds. These variables result in a non-linear relationship between LVM feedrates and emission rates; however, this variability is inconsequential. As Region 5 stated:

the 2013 CPT showed that the facility's SVM and LVM emissions are confined within a very narrow band at the low end of the emission standards (average measured emissions during the 2013 CPT ranged from 0.41 to 6.5 percent of the 230 ug/dscm standard for SVM, and from 2.8 to 11 percent of the 92 ug/dscm standard for LVM). Thus, [EPA] expect any variability would be confined approximately to the bottom 6.5 percent of the SVM standard, and the bottom 11 percent of the LVM standard, which suggests that any variability would likely be inconsequential with respect to compliance with the relevant standards.

2019 RTC at 20-21. Hence, due to the rates being very small and at the low end of the emission standard, it does not take much of a minute variation to result in a non-linear impact between the feedrates and the emission rates because of the overall relatively minor amounts involved. More importantly, Veolia's CPTs have consistently demonstrated compliance with all of the emission limitations of the HWC MACT and ABC's assertion of this allegation raises no issue that hasn't been considered and ultimately rejected by Region 5.

The issues cited by ABC to support its Petition are not new, with each having been raised and responded to at some point over the last decade. EPA and/or Veolia have either resolved, refuted or discounted, upon further information, each of the issues. In the years leading up to the 2017 permit decision, Region 5 never took action against Veolia based on any of these issues that resulted in an administrative or judicial review. The faultiness of these issues was highlighted when Region 5 issued the 2017 Permit and Veolia was provided with a direct appeal

to this Board. On appeal, Veolia objected to Region 5's inclusion of incomplete, unsubstantiated and unproven facts as a part of its permit decision, which encompassed objections to the factual assertions that ABC raises and others. Region 5's reevaluation of these assertions in the midst of settling the permit appeal was reasonable and justified.

2. ABC mischaracterizes Region 5's reasoning concerning its reevaluation of the data and facts concerning LVM and SVM

ABC complains that Region 5's reevaluation of the data and facts concerning LVM/SVM "references no discernable new facts or studies" and does not show that "circumstances have changed."⁴³ In other words, ABC believes that nothing changed from the issuance of the 2017 Permit that warranted revision of the permit to remove multi-metals CEMS and certain FAP provisions. Nothing could be further from the truth. Region 5 was faced with a new set of facts and a different set of circumstances after Veolia appealed the 2017 Permit, specifically, the consideration of LVM/SVM emissions as the sole basis for the enhanced monitoring and the prospect of administrative and judicial review of Region 5's permitting action.

ABC dismisses the installation of mercury controls on incinerators 2 and 3 as unrelated to LVM/SVM; however, what ABC fails to understand is that consideration of mercury drove Region 5's focus and permitting decisions related to Veolia from the time Region 5 took over Title V permitting authority until the date that Veolia agreed to install the ACI systems.⁴⁴ Because mercury was the focus, Region 5 never evaluated LVM/SVM as an independent basis for the enhanced monitoring it was proposing. That changed when Veolia appealed the permit and subsequently agreed to install mercury controls as part of a settlement. For the first time, Region 5 had to evaluate the facts and data concerning Veolia's LVM/SVM emissions as the

⁴³ Petition at 17.

⁴⁴ 2018 SOB at 8 (stating that the majority of the data in the record relates to mercury emissions).

only basis for the multi-metals CEMS and enhanced FAP. Upon consideration of this significant new fact, Region 5 correctly determined that the LVM/SVM record standing alone could not support the enhanced monitoring included in the 2017 Permit.⁴⁵

The circumstances also significantly changed for Region 5 from issuance of the 2017 Permit. As set forth above, Veolia had for years challenged the alleged facts that Region 5 asserted with regard to certain Veolia CPT runs in 2006 and 2008. Even though Veolia had presented evidence that the alleged exceedances were either not a violation and/or a one-time isolated event, Region 5 failed to recognize these incidents for what they were—single data points among years of results that demonstrated compliance and large margins of safety. In fact, Region 5 had no compelling reason to assess Veolia’s evidence or scrutinize its decision-making on the issue. Circumstances, however, dramatically changed when Veolia appealed the 2017 Permit to the Board. Suddenly, Region 5 had to be concerned with administrative and judicial review of the factual underpinnings of the 2017 Permit. This prompted a reevaluation of the CPT incidents in light of the evidence Veolia had submitted over the years and led Region 5 to conclude that these now decade-old incidents were isolated data points that were not consistent with all of Veolia’s other CPT results.⁴⁶ Thus, the 2017 Appeal changed the circumstances for Region 5, and contrary to ABC’s view, provided the necessary impetus for a reevaluation of its permitting decision.

Region 5 did not simply change its mind on the basis of the same facts. Rather, Region 5 considered new facts (installation of the ACI systems) and changed circumstances (the consideration of LVM/SVM emissions as the sole basis for the enhanced monitoring and the

⁴⁵ 2018 SOB at 12-16.

⁴⁶ 2018 SOB at 10-11.

prospect of administrative and judicial review of Region 5's permitting action) and issued the 2019 Permit on the basis of those new facts and changed circumstances.

B. The FAP Provisions of the 2019 Permit Assure Compliance With the Clean Air Act

The enhanced FAP contained in the 2019 Permit contains provisions that will assure Veolia's compliance with the HWC MACT. Even ABC admits that the "2019 Permit's provisions represent an improvement over the system used before."⁴⁷ However, not surprisingly, ABC contends that the FAP must include even more sampling and analysis. ABC's argument almost exclusively rests on the findings of the National Enforcement Investigations Center ("NEIC") that inspected the Veolia facility and prepared a report on Veolia's analysis of waste streams.⁴⁸ What ABC fails to emphasize is the NEIC investigation took place eight years ago and the NEIC report is over seven years old. Further, Veolia and Region 5 have discussed and negotiated almost every provision of the FAP taking into consideration and implementing the NEIC's suggested compliance enhancements. ABC ignores this context and instead just regurgitates old unproven allegations concerning the FAP that have been addressed over the ensuing eight years since the NEIC completed its investigation.

1. ABC's criticisms of the 2008 FAP are based on old, untested allegations that out of an abundance of caution Veolia addressed through more frequent sampling and therefore are irrelevant

ABC attempts to dredge up objections to Veolia's 2008 FAP in hopes of showing that the enhanced FAP provisions included in the 2019 Permit do not go far enough to address deficiencies alleged by the NEIC. In so doing, ABC provides verbatim the cavalcade of points

⁴⁷ Petition at 23.

⁴⁸ ABC also mentions the 2017 RTC as a basis for its objections, but the 2017 RTC also relied on the NEIC Report and therefore these are not independent basis of support. Petition at 23; 2017 RTC 127.

concerning the facility's waste analysis procedures that Veolia has previously shown are unsupported, unverified or mischaracterized and that have never served as the basis for any final agency action.⁴⁹ Moreover, Veolia, out of an abundance of caution, and although not technically required to do so, is currently sampling and analyzing every waste stream that is suspect for metals each and every time those waste streams are received at the facility, unless those waste streams are exempt from sampling due to safety risks.⁵⁰ Veolia initiated this practice even before the FAP provisions of the 2019 Permit were fully effective. Each one of ABC's waste profile examples, which come directly from the NEIC report, involve metals, are on the suspect list, and, unless subject to an exemption, would be sampled and analyzed every time they are received by Veolia.⁵¹ Thus, these eight-year-old alleged deficiencies have been addressed through compliance mechanisms and are no longer relevant.

2. The 2019 FAP is more stringent than Veolia's prior FAP and provides a significant margin of safety for the incineration of wastes containing LVM and SVM

Region 5 reasonably determined that the FAP provisions of the 2019 Permit were sufficient to assure compliance and ABC's claims to the contrary are erroneous. Region 5's decision rests on consideration of the whole permit, inclusive of all of its controls and monitoring provisions and in light of data demonstrating Veolia's compliance.⁵² By contrast, ABC's

⁴⁹ 2014 Veolia Comments, EPA-R05-OAR-2014-0112 at VES019503-019522 and VES019574-019589, 2017 Veolia Petition, EPA-R05-OAR-2014-0280-0280; Region 5 Brief at 18.

⁵⁰ This is above and beyond the requirement in Condition 2.1(D)(4)(d)(ii)(B)(I).

⁵¹ Waste Profile 236152 is no longer active because the waste is no longer being generated. Subsequent to the NEIC investigation, Profile 236152 was sampled and analyzed each time it was received.

⁵² 2019 RTC at 37 (providing that Veolia's "large margin of compliance associated with the emissions of LVM or SVM"; the installation of ACI; the enhancements to the FAP; bag leak detection systems; compliance with OPLs for minimum incinerator temperature, maximum flue gas flowrate, maximum hazardous waste feedrate, and maximum incinerator pressure; and CPTs all serve as the basis for Region 5's permitting decision.)

arguments against the 2019 FAP rest on superficial critiques of highly technical matters that have been the subject of lengthy negotiations between the subject matter experts at Region 5 and Veolia over years.⁵³ ABC's attacks provide no technical analysis to these issues and add nothing new in response to Region 5's well-reasoned explanations in the Statement of Basis and Response to Comments. *See In re Peabody W. Coal Co.*, 12 E.A.D. 22, 23 (EAB 2005) (denying review of technical issues "absent any specific factual or technical analysis demonstrating that the Region's monitoring and recordkeeping provisions were unreasonable, and given Region IX's apparently rational consideration of relevant factors"); *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 673 (EAB 2006) (noting that "the regulation governing response to comments in a permit proceeding only requires that the Region '[b]riefly describe and respond to all significant comments'" (internal citations omitted)). The Board should dismiss ABC's complaints and issue the permit consistent with the Board's deference to permit issuers making highly technical determinations.

ABC's failure to offer any meaningful technical analysis or new evidence challenging Region 5's decision is exemplified by ABC's admission that the 2019 FAP is an improvement on past FAPs while arguing that more must be done. However, ABC is woefully short on analysis and evidence that Region 5's technical determination was incorrect. ABC's only refrain is that the permit should require Veolia to physically test every waste stream prior to processing.⁵⁴ Such a requirement would be impractical and dangerous—it is also not what the HWC MACT requires.⁵⁵ After over ten years of negotiations, Region 5, whose congressionally mandated duty

⁵³ ABC mistakenly states that the 2019 FAP is based on 2015 discussions with EPA. Petition at 22. In fact, the FAP revisions have been part of the ongoing negotiations since Veolia has been subject to the HWC MACT, both before and after 2015.

⁵⁴ Petition at 23.

⁵⁵ 40 C.F.R. 63.1209(c)(2)(ii) allows the use of "other methods," including "using analytical information obtained from others or using other published or documented data," to characterize waste.

is to protect the environment, is satisfied with the FAP provisions contained in the 2019 Permit. The FAP will ensure compliance and function effectively in the commercial hazardous waste incineration environment in which it will be applied. ABC disagrees with these conclusions and will likely disagree regardless of how many sampling and analysis provisions are added to the FAP.⁵⁶ ABC is entitled to its views; however, ABC has not provided evidence sufficient to show that Region 5's permitting decision was erroneous or clearly erroneous.

ABC references Permit condition 2.1(D)(4)(d)(ii)(B)(VII)(cc), which requires Veolia to conduct additional testing and make changes to waste profiles "if it determines through a review of other information" that the metals levels are incorrect. ABC complains that nothing requires Veolia to seek out this information and that generators have no particular interest in determining what is in their waste. ABC's comments demonstrate a profound misunderstanding of how a commercial hazardous waste incinerator operates and are contrary to the basis of RCRA.

Veolia does not generate the waste it handles, but its business is based upon destroying the constituents which make up that waste. Hence, Veolia assesses a premium surcharge for the destruction of certain types of metal-containing waste. Veolia therefore has a significant economic incentive to quantify metals in the waste it handles. Moreover, Veolia has invested heavily in the training of its employees, the physical assets in its facility and the siting of its facility. Veolia has no incentive to put any of this value at risk from a compliance standpoint. Therefore, although not technically required, Veolia has endeavored to evaluate all of its waste

⁵⁶ Interestingly, the Interdisciplinary Environmental Clinic which represents ABC is located on Washington University's campus and is a pro bono law practice open to second and third-year students attending Washington University's law school. Washington University is one of Veolia's largest clients and renewed its contract with Veolia during the pendency of this appeal. Similarly, various federal, state and local agencies audit Veolia and subsequently utilize Veolia for hazardous waste disposal of all types including wastes generated from drug enforcement and munitions disposal. Veolia has an open door policy and welcomes the public to come and tour its facility.

profiles such that each profile is updated at a minimum of every two years. As a part of this process, Veolia obtains additional information and data from the generator and other sources such as updated product information, safety data sheets, and any other analytical results that may have been collected by the generator or others. This review is already part of Veolia's compliance with condition 2.1(D)(4)(d)(ii)(B)(VII)(cc) and adding a requirement to the permit for Veolia to seek this information is unnecessary and duplicative of its current process.

ABC's second point stands RCRA on its head. The entire RCRA process is built on generator knowledge "cradle to grave." Generators are legally required to characterize their waste accurately in their hazardous waste manifests and the characterization they create is relied on throughout the handling, transportation, and ultimate disposal process. 40 C.F.R. § 262.11 ("A person who generates a solid waste, as defined in 40 C.F.R. § 261.2, *must make an accurate determination* as to whether that waste is a hazardous waste in order to ensure wastes are properly managed according to applicable RCRA regulations"(emphasis added)); § 262.20(a)(1) (detailing generator obligation to prepare hazardous waste manifests). As Congress recognized in its 1984 amendments to RCRA, "[b]ecause the generator is in the best position to know the nature of his waste material, the regulatory scheme established by RCRA places a duty on the generator in the first instance to make arrangements to transport and dispose of his waste properly." *United States v. Fiorillo*, 186 F.3d 1136, 1149 (9th Cir. 1999) (quoting H.R. Rep. No. 98-198, pt. I); *see also In Re Ashland Chem. Co.*, 3 E.A.D. 1, 6 n.13 (EAB 1989) ("the burden of complying with the manifest requirements rests squarely on the generator"). RCRA dictates that generators are in the best position to accurately characterize their waste and the law requires them to do so.

It is vital that Veolia and other treatment, storage, and disposal facilities (“TSDs”) be able to use a generator’s waste determination in the waste characterization process. It is unlikely that ABC would contend that every transporter of hazardous waste must disregard the generator’s waste determination and proceed to sample and analyze each and every waste stream before their trucks are loaded and proceed down public highways where accidents and spills could expose the public to dangerous substances. If that were the case, hazardous waste would pile up everywhere awaiting shipment, exposing the public to even greater potential dangers and violating another tenant of RCRA that hazardous waste should not be stored for longer than absolutely necessary before disposal.⁵⁷ Yet, this kind of sampling and analysis standard is what ABC wishes to impose on Veolia. ABC simply disregards RCRA and its requirements. Taking the onus off of generators in the manner ABC proposes is bad policy as it risks safety, human health and the environment at every step in the hazardous waste handling and disposal chain. TSD’s like Veolia have significant responsibilities under RCRA, including the obligation to accurately characterize all of the waste they receive for treatment and disposal, and Veolia has exceptional RCRA compliance. However, the burden of defining the waste through sampling and analysis must not fall entirely to them. This is not practical and is not consistent with the law. Moreover, placing 100% of the burden on Veolia to sample and analyze everything creates the wrong incentive for generators, transporters, and other handlers of hazardous waste.

The 2019 FAP requires more frequent testing and ABC grudgingly admits this truth. ABC states that this may “eventually” lead to better MACT compliance. However, the process of working through the profiles that ABC hopefully opines will happen eventually, in fact has already occurred. The whole truth that ABC refuses to recognize is that Veolia is, and always

⁵⁷ See 40 C.F.R. § 262.16-262.17 (time limits for on-site accumulation of hazardous waste).

has been, in full compliance with MACT. Regardless of the number of times ABC cites to allegations made in unproven NOV's or FOV's or investigation documents, the truth is that none of these were meritorious enough to withstand the scrutiny necessary for final agency action. Each document and each allegation contained within each document fell under its own weight and was never pursued.⁵⁸

ABC also opines that all non-suspect wastes should be tested more frequently due to a concern that metal containing waste streams may be swept into a non-suspect category and never be tested. However, the 2019 FAP already addresses this concern and Veolia does sample and analyze non-suspect wastes. Veolia must sample and analyze a waste in order to place a waste on the non-suspect list in the first place.⁵⁹ Veolia must sample and analyze the non-suspect waste again when the profile is recertified, which occurs at least every two years.⁶⁰ Under the 2019 FAP, Veolia must assign a minimum metals concentration to *all* analyzed waste streams. The impact of this provision is that Veolia will be *overestimating* and therefore *over-reporting* the metals content of its non-suspect and suspect waste streams. This overestimation results in a decreased feedrate in order for those streams to comply with the OPLs—this is an additional margin of safety. Consistent with its other arguments, ABC completely fails to explain why assigning a metals content to waste streams that do not contain metals and therefore adds a margin of safety, will not assure compliance.

ABC also takes issues with Veolia's ability to add items to the "exempt list," which designates materials that do not need to be tested.⁶¹ The permit condition provides that Veolia

⁵⁸ 2014 Veolia Comments, EPA-R05-OAR-2014-0112 at VES019575, VES019951 and VES019521.

⁵⁹ Condition 2.1(D)(4)(d)(ii)(B)(III)

⁶⁰ *Id.*

⁶¹ Condition 2.1(D)(4)(d)(ii)(F).

may add exempt items by providing notice to Region 5; the agency then has 30 days to object to the designation and may extend the period further if it requests additional information.⁶² Region 5 is the permitting authority and does not directly permit any other HWCs. As evidenced by the factual record here, Region 5 has tremendous familiarity with the facility and its operations. The system set forth in the FAP is an efficient method that allows Veolia to handle the hazardous waste in an appropriate manner after expiration of the 30 day objection period. This process allows Region 5 ample time to communicate any concerns and reduces the administrative burden on Region 5 in relieving them of an obligation to draft a response if they have no objections. Additionally, if Region 5 were required to submit an affirmative approval and was delayed in doing so, Veolia would be forced to either conduct potentially risky testing or hold the hazardous waste for long periods of time, which also presents safety and environmental concerns.⁶³ The mechanism ABC complains about eliminates both of those problematic scenarios. The 2019 FAP is a reasonable compromise in that it allows EPA a reasonable time to object while also ensuring that Veolia can continue to operate. ABC fails to show otherwise.

ABC alleges with no support that a more stringent FAP is needed because of the removal of the multi-metals CEMS. Veolia agrees that the FAP is important for MACT compliance. Veolia also agrees with ABC that the FAP in the new permit is more stringent than Veolia's prior FAP. Having said this, the FAP is part of the HWC MACT, the multi-metals CEMs is not. As discussed below, the multi-metals CEMs was removed because Region 5 determined the multi-metals CEMs were no longer necessary in light of installation of the ACI systems and the

⁶² Condition 2.1(D)(4)(d)(ii)(F)(IV)(ff).

⁶³ For example, Veolia receives organic peroxides which are temperature sensitive and must be shipped in dry ice. Veolia must sustain the temperature by adding more dry ice during storage and long holding times pose safety risks.

facility's low-level emissions of SVM and LVM. Also, despite ABC's claims, the multi-metals CEMS would not have provided verifiable data such that the FAP could be improved with its use.⁶⁴

Finally, ABC concludes that the 2019 permit is based on "erroneous facts." ABC's statement should be disregarded. Region 5's findings of fact related to the 2019 FAP rests on consideration of the entire permit, including the enhancements to the FAP agreed on between Region 5 and Veolia and Veolia's demonstrated record of having emissions of LVM and SVM that are at the low end of the range of compliance. ABC has entirely failed to show that any of Region 5's findings related to the FAP, or the permit as a whole, are erroneous. Instead, ABC has simply regurgitated old criticisms with no new evidence or technical analysis. A fact is not erroneous because ABC disagrees with it and ABC has failed to meet its burden on review. *In re San Jacinto River Authority*, 14 E.A.D. 688, 692 (EAB 2010) ("Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is unsubstantiated.").

⁶⁴ Veolia has supplied significant evidence on this point in its comments and its 2017 Appeal. While Region 5 has stated that it has not made its permit decision based on any facts concerning the multi-metals CEMs availability or reliability, Veolia believes the evidence clearly shows that the multi-metals monitoring devices imposed by the Draft 2017 Permit are flawed instruments that are non-Method 29 compliant and are not yet ready to be applied to HWCs. Indeed, in its appeal, ABC simply assumes the multi-metal CEMs will work for all LVMs and SVMs. ABC's assumption is wrong on many levels including the fact that the multi-metals CEMs cannot and does not claim to be able to measure beryllium, one of the three LVMs ABC alleges it is concerned about. EPA-R05-OAR-2014-0280-0112 at VES019563.

C. EPA Correctly Decided that the 2019 Permit Assures Compliance Without the Inclusion of the Flawed Multi-Metals Monitoring Technology

1. The CPTs required by the HWC MACT are stress tests designed to push incinerators up to the limits so that normal operations ensure compliance

ABC mischaracterizes the role and utility of CPTs under the HWC MACT simply for the sake of their argument. CPTs are the required and accepted compliance mechanism under the HWC MACT. 40 C.F.R. § 63.1206(b)(2). CPTs are used to set operating parameter limits (“OPLs”)—i.e. feedrates—and for purposes of monitoring compliance with emission limits. ABC takes issue with the CPTs as effective compliance mechanisms because it alleges that CPTs “are performed under conditions completely controlled by Veolia and Veolia plans extensively for the CPTs in advance.”⁶⁵ ABC then posits that “because of [Veolia’s control and planning] a violation of the HWC MACT during a CPT is concerning” and that if violations occur during the “most carefully controlled conditions” of the CPT, “then what is happening during the less controlled stress and strain of every day operation?”⁶⁶ ABC either fundamentally misunderstands the role and function of the CPTs or, more likely, is mischaracterizing the tests for the purposes of its argument. Contrary to ABCs assertions, CPTs under the HWC MACT are a combination of compliance exercise and stress test. CPTs are used to set OPLs and to test the facility’s compliance with emission limits. This is why the HWC MACT requires that CPTs be conducted under “operating conditions representative of the *extreme range of normal*.” 40 C.F.R. § 63.1206(b)(2) (emphasis supplied). The HWC MACT does not provide a definition of “extreme range of normal”; however, the directive clearly contemplates testing the facility at or near

⁶⁵ Petition at 17.

⁶⁶ *Id.*

maximum capacity.⁶⁷ In order to achieve this, Veolia must feed significantly more metals during the CPTs than it would during day-to-day operations.⁶⁸ Veolia must push the incineration units while maintaining compliance with all of the emissions limits.⁶⁹ This is no simple task and there is little room for error during the tests.

Further, and contrary to ABC's assertions, while Veolia is ultimately responsible to run the CPTs, the actual tests are conducted with professional stack testing companies and controlled not by Veolia, but by the provisions of EPA Method 29.⁷⁰ ABC attempts to create an inference that the CPTs are in some way less demanding than day-to-day operations and therefore are not representative. This is simply wrong. The CPTs under the HWC MACT are stringent tests that go far beyond daily operating conditions and Veolia has demonstrated consistent compliance with the applicable standards.

2. Veolia has demonstrated compliance with the LVM and SVM limits during its CPTs and has established a margin of safety such that Region 5 correctly determined that the results supported a permit without multi-metals CEMS

Veolia has demonstrated specific compliance with all LVM and SVM emissions limits through its CPTs as shown in the following charts:

⁶⁷ Regarding representative conditions, EPA's stack testing guidance generally provides: "For a facility operating under an emission rate standard (e.g., lb/hr) or concentration standard (e.g., µg/m3) ... EPA recommends that the facility should conduct a stack test at maximum capacity or the allowable/permitted capacity." EPA, Clean Air Act National Stack Testing Guidance 15 (April 27, 2009) ("Stack Testing Guidance"), at https://www.epa.gov/sites/production/files/2013-09/documents/stacktesting_1.pdf. The guidance also provides "Individual standards may more specifically define operating conditions under which performance tests should be conducted." *Id.*

⁶⁸ Metals are fed in carefully measured amounts in their pure form to create an extreme range of normal operating condition.

⁶⁹ Stack Testing Guidance 14.

⁷⁰ 70 Fed. Reg. 59,402, 59,412 (Oct. 12, 2005).

2008 CPT Test Results for LVM (ug/dscm at 7% O₂)⁷¹					LVM Emission Limit[†] 97 ug/dscm
Unit	Total LVM Run 1	Total LVM Run 2	Total LVM Run 3	Average**	
Unit 2*	66.6/10.2	56.0/3.2	51.6/7.5	58.1/6.9	
Unit 3	28.6	20.1	15.6	21.4	
Unit 4	5.2	10.3	13.5	9.6	
2008 CPT Test Results for SVM (ug/dscm at 7% O₂)					SVM Emission Limit[†] 240 ug/dscm
Unit	Total SVM Run 1	Total SVM Run 2	Total SVM Run 3	Average**	
Unit 2*	230/32.4	242/10.4	242/26.9	238/23.2	
Unit 3	58.6	67.1	46.2	57.3	
Unit 4	22.3	31.7	27.1	27.0	

*Initial test runs were completed on August 11th (first value). Due to the baghouse issue discussed in Section IV.A.1.b., Unit 2 was retested on September 8th (second value). Even with the baghouse issues that have been previously discussed, Unit 2 complied with the applicable limit.

**40 C.F.R. §63.7(e)(3) dictates that the average of three runs is the result used for compliance.

†These are the interim standards that were in effect until the effective date of the final replacement standards on October 14, 2008. *See* 40 C.F.R. §63.1203(a), §63.1219(a), 70 Fed. Reg. 59,402, 59,412 (Oct. 12, 2005).

2013 CPT Test Results for LVM (ug/dscm at 7% O₂)⁷²					LVM Emission Limit[†] 92 ug/dscm
Unit	Total LVM Run 1*	Total LVM Run 2*	Total LVM Run 3*	Average**	
Unit 2	<2.8	<2.4	<2.5	<2.6	
Unit 3	<8.6	<8.9	<11	<9.4	
Unit 4	<12	<9.8	<7.5	<9.7	
2013 CPT Test Results for SVM (ug/dscm at 7% O₂)					SVM Emission Limit[†] 230 ug/dscm
Unit	Total SVM Run 1*	Total SVM Run 2*	Total SVM Run 3*	Average**	
Unit 2	<1.1	<0.78	<1.0	<0.95	
Unit 3	<20	<14	<12	<15	
Unit 4	<8.6	<4.5	<10	<7.8	

*The 2013 CPT consisted of more than three runs. The runs included in the table represent the three used to generate the average for compliance purposes.

**40 C.F.R. §63.7(e)(3) dictates that the average of three runs is the result used for compliance.

†These are the final replacement standards effective on October 14, 2008. *See* 40 C.F.R. §63.1219(a), 70 Fed. Reg. 59,402, 59,412 (Oct. 12, 2005).

⁷¹ EPA-R05-OAR-2014-0280-0253 to 0255.

⁷² EPA-R05-OAR-2014-0280-0005.

These results show that Veolia’s compliance with the applicable LVM and SVM emissions limitations has been consistent over multiple runs of successive CPTs. Moreover, even though Veolia’s emissions have always been below the standards set by the HWC MACT rule, the facility’s emissions have decreased significantly in the decade since the 2008 CPT. Emissions have improved to the extent that the lowest margin of compliance is now 89% of the standard and the highest is 99.6% of the standard.⁷³ In other words, the 2013 results demonstrate that there is a significant—89% or above—margin of safety before Veolia would even reach the HWC MACT limits.

Veolia conducted CPTs again in 2018 and the results from those tests further show Veolia’s high-level of compliance with the LVM and SVM limits:

2018 CPT Test Results for LVM (ug/dscm at 7% O₂)⁷⁴					LVM Emission Limit[†] 92 ug/dscm
Unit	Total LVM Run 1	Total LVM Run 2	Total LVM Run 3	Average**	
Unit 2	<4.1	<3.0	<3.2	<3.4	
Unit 3	<3.6	<5.3	<4.1	<4.3	
Unit 4	<7.2	<6.6	<7.6	<7.1	
2018 CPT Test Results for SVM (ug/dscm at 7% O₂)					SVM Emission Limit[†] 230 ug/dscm
Unit	Total SVM Run 1	Total SVM Run 2	Total SVM Run 3	Average**	
Unit 2	2.6	<1.5	<2.4	<2.2	
Unit 3	<2.1	<1.1	<2.9	<2.0	
Unit 4	<9.3	<10	<7.1	<8.9	

**40 C.F.R. §63.7(e)(3) dictates that the average of three runs is the result used for compliance.

†These are the final replacement standards effective on October 14, 2008. See 40 C.F.R. §63.1219(a), 70 Fed. Reg. 59,402, 59,412 (Oct. 12, 2005).

The 2018 CPT results confirm Region 5’s reasoning and show a continued drop in emission levels and a commensurate increase in the margin of safety. In fact, the 2018 CPT

⁷³ 2018 SOB at 9; 2013 CPT Reports.

⁷⁴ EPA-R05-OAR-2014-0280-0643.

results show margins of compliance ranging from 92% to 99.14% of the LVM and SVM standards. While these results have not yet been incorporated into the permit, they are strong support that Veolia's LVM and SVM emissions are well-established at the low-end of the standard and do not support the application of enhanced monitoring, including a multi-metals CEMs.

A look at the 2008, 2013, and 2018 CPT results also make it clear that the lone exceedance in the 2006 CPT, and the near exceedance in the 2008 CPT, are true outliers and Region 5 was correct to dismiss those decade-old anomalous results. Veolia's excellent performance and decreasing emissions as evidenced by the CPTs shows that the ABC's dredging up of old, unsubstantiated, and unproven accusations is without merit and should be dismissed out of hand by the Board.⁷⁵

3. Veolia feeds only a fraction of its permitted limits for metals and therefore Region 5's decision to remove the multi-metals monitors is warranted

In its 2018 Statement of Basis, Region 5 stated:

EPA has determined that it is unlikely that the SVM and LVM emissions will spike to the levels that are high enough to violate the applicable SVM and LVM HWC NESHAP emissions limits, respectively. Even if large spikes in SVM and LVM emissions were to occur, given the margin of compliance demonstrated by the CPTs, EPA believes that the enhanced feedstream analysis procedures in this draft permit, in conjunction with other monitoring requirements specified in this draft permit, will be sufficient to assure compliance with the SVM and LVM emission limits.

As set forth above, Veolia's CPT results, including the 2018 results, fully support Region 5's analysis and provide a margin of safety due to the low level of SVM and LVM emissions as compared to the HWC MACT standards. Another significant source of support for Region 5's position is that large spikes in LVM and SVM emissions are unlikely to occur in light of the

⁷⁵ This is specifically true concerning the 2009 allegations regarding an arsenic spike. As explained in Section IV.A.1.c., this accusation was and continues to be totally baseless.

actual amount of LVM and SVM containing wastes fed into the incinerators. Veolia feeds only a fraction of the amount of LVM and SVM metals it is permitted to feed:

Actual Veolia LVM Feed 2014 – 2018					
	Average Total LVM Feed (2014-2018) (lbs/hr)	Permitted Total LVM Feed (2014-2018) (lbs/hr)	% Actual LVM Feed compared to Permitted LVM Feed (%)	2013 CPT Avg. System Removal Efficiency (%)	2018 CPT Avg. System Removal Efficiency (%)
Unit 2	0.2	46	0.3	99.999918	99.999885
Unit 3	0.1	46	0.3	99.999528	99.999852
Unit 4	4.0	46	8.7	99.999181	99.999385

Actual Veolia SVM Feed 2014 – 2018					
	Average Total SVM Feed (2014-2018) (lbs/hr)	Permitted Total SVM Feed (2014-2018) (lbs/hr)	% Actual SVM Feed compared to Permitted SVM Feed (%)	2013 CPT Avg. System Removal Efficiency (%)	2018 CPT Avg. System Removal Efficiency (%)
Unit 2	0.1	65	0.1	99.999977	99.999948
Unit 3	0.1	65	0.1	99.999784	99.999951
Unit 4	6.7	64	10.5	99.999507	99.999431

As indicated by the tables, Veolia is feeding, on average, only .1% of its permitted limit for SVMs and 0.3% of its permitted limit for LVMs at Units 2 and 3. Even with regard to Unit 4, Veolia is still not feeding more than 10.5% of its permitted limit for SVMs and 8.7% for LVMs. These are exceptionally small rates, which provide an additional margin of safety. It is also important to understand that these are feedrates and not emissions. Veolia has demonstrated excellent removal efficiency during its CPTs and over 99% of the LVM and SVM fed are captured by Veolia’s pollution control equipment and not emitted through the stack. This provides an even greater additional layer of safety against potential spikes in LVM or SVM emissions. Moreover, the table shows averages of Veolia’s feeds from 2014 through 2018—a

full five years of data. These low feedrates, combined with the CPT results, and enhanced FAP provisions, fully justify the removal of the multi-metals CEMs condition from the permit.

D. *FCC v. Fox Television Does Not Apply and Region 5 Fully Justified Its 2019 Permitting Decision Based on New Facts and Changed Circumstances*

Fox does not change the standard of review for permit appeals before the Board. *See Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 726 (D.C. Cir. 2016) (declining to extend *Fox* to the permitting context). But, even assuming *arguendo* that *Fox* could govern certain permit appeals, the standard proposed by ABC concerning “an agency’s change of mind” still does not apply to this appeal for two reasons: (1) the 2017 permit decision does not constitute final agency action that can be distinctly compared to the 2019 Permit; and, (2) the 2019 Permit rests on new factual findings and changed circumstances relative to the 2017 permit decision, rather than “factual findings that contradict those which underlay” Region 5’s 2017 permit decision. *See Fox*, 556 U.S. at 515. Moreover, Region 5 thoroughly explained the factual and legal justifications for the 2019 Permit.

ABC contends that *Fox*, a case involving judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 (“APA”), should apply to or provide guidance for this permit appeal. Judicial review under the APA, however, applies only to “final agency actions.” 5 U.S.C. § 704. In order for an action to be final within the meaning of the APA, “[f]irst, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (internal quotations omitted).

In *Fox*, the Supreme Court reviewed a change in policy expressed through two separate administrative orders issued twenty-nine years apart to different broadcasters for airing

“indecent” language on their programs. 556 U.S. at 506-09. Although an issue regarding finality did not arise in *Fox*, both of the FCC’s orders would no doubt independently constitute final agency actions because they (a) consummated the FCC’s decisionmaking processes with respect to the policies applied to each broadcaster and (b) determined the legal rights and obligations of the broadcasters under the agency’s two versions of the “indecent language” policy. Likewise in *Organized Village of Kake*, the U.S. Department of Agriculture promulgated two separate and distinct final versions of the “Roadless Rule” that differed with respect to their treatment of the Tongass National Forest. *See* 795 F.3d 956, 962 (9th Cir. 2015).

The circumstances of APA cases like those cited by ABC are hardly analogous to this permit appeal. Recasting *Fox* in the permit appeal context would require revisions to the very concept of finality because the Board does not review final agency actions, nor do its decisions constitute final agency actions. 40 C.F.R. § 124.19(l); *see also In re Desert Rock Energy Co.*, 14 E.A.D. 484, 506 (EAB 2009). For this reason, an EPA permitting decision that precedes Board review does not meet the APA’s definition of “final agency action” either, since that decision does not consummate the agency’s decisionmaking process and does not conclusively determine the permittee’s rights or obligations. *See, e.g.*, 40 C.F.R. § 124.16 (stays of contested permit conditions during permit appeals).

If an EPA decision regarding a draft permit was somehow construed as the Board analogue to an APA final agency action—ostensibly allowing petitioners to appeal permits under APA standards—then other procedures associated with permit appeals may become unworkable. For example, this would likely hamstring the permit authority’s ability under § 124.19(j) to unilaterally withdraw a permit prior to the Board’s grant of review, a power that agency-defendants do not possess in federal court. Even after the Board grants a petition for review, the

permit authority can seek permission from the board to voluntarily remand a permit with or without the consent of the other parties. *In re Desert Rock Energy Co.*, 14 E.A.D. at 493 (“[a] voluntary remand is generally available where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit” (internal quotation marks and citation omitted)).

That is precisely what happened with respect to the 2017 permit decision. The Board Granted Region 5 and Veolia’s motion for a voluntary remand and dismissed Veolia’s petition without prejudice. Region 5 then proceeded through the administrative channels, including public notice and comment, and issued the now-contested 2019 Permit. Neither permitting decision constituted “final agency action” within the meaning of the APA. Thus, there is simply no methodological basis for meshing the APA and *Fox* in the manner sought by ABC (to compare two tentative agency permitting decisions as if they were discrete policies) with the regulations and practical considerations underlying permit appeals before the Board.

Irrespective of whether *Fox* and *Organized Village of Kake* could apply at all to permit appeals, ABC’s application of *Fox* to this appeal is predicated on the claim that the 2019 Permit rests upon factual findings which contradict those underlying the 2017 permit decision. *See* Petition at 32. As set forth above, the 2019 permit decision rests Region 5’s evaluation of new facts and changed circumstances—installation of the ACI systems and LVM/SVM emissions as the sole basis of potential support for the enhanced monitoring (where mercury had been the primer driver)—that fully support the decision. While alleged contrary facts appear in the record related to prior permitting decisions, as Veolia has explained above and throughout this

permitting process, those alleged facts have never been proven or substantiated and should not have been the basis for any of the prior permits and do not serve as the basis for the 2019 permit.

Finally, even if *Fox* and/or *Kake* did apply to permit appeals as well as this appeal (which for the reasons set forth above would be a misapplication of the case), Region 5 meets the *Fox* standard because the agency fully explained its justification for the 2019 Permit.⁷⁶

V. CONCLUSION

Region 5's decision to issue the 2019 Permit was legally and factually correct. Region 5 issued the 2019 Permit without the enhanced monitoring provisions previously included in the 2017 Permit based on new facts and changed circumstances that arose after Veolia's 2017 Appeal; specifically: 1) the required installation of carbon injection systems to control mercury emissions and 2) the reevaluation of Veolia's LVM and SVM emissions as the sole basis for the enhanced monitoring and the prospect of administrative and judicial review. Region 5 rightly determined that the addition of carbon injection negated the need for unverified, sole-sourced multi-metals monitors and certain enhanced FAP provisions to ensure compliance with the HWC MACT mercury limits. ABC does not even contest the validity of this determination. With mercury controls in place, Region 5 correctly reevaluated the facts and data related to Veolia's LVM and SVM emissions and determined that the unverified, sole-sourced multi-metals monitors and certain enhanced FAP provisions were no longer supported on the basis of these emissions alone because a significant margin of safety exists as demonstrated by Veolia's CPT results and safeguarded through the enhanced 2019 FAP. ABC has failed to show that Region 5's decision is erroneous in any respect. Veolia's CPT results, which are generated under worst case operating conditions, evidence a wide margin of compliance and a significant margin of

⁷⁶ See Region 5 Response to the Petition at 15-20.

safety. Even when high amounts of LVM and SVM are fed during the extreme conditions of the CPT, Veolia's units emit a small fraction of the metals fed and produce emissions that are minor relative to the emission limits. Moreover, the FAP included in the 2019 Permit is more stringent and requires more sampling and analysis for metals than ever before—a fact admitted by ABC. This provides yet another layer of safety against violations of the HWC LVM and SVM limits. Finally, as Veolia provided above, Veolia feeds only a small percentage of the metals-containing waste that it could feed under its permit limitations. This adds a final layer of safety to what is already a miniscule amount of SVM and LVM emissions. ABC's arguments concerning old, unproven allegations and irrelevant accusations do not counter the tremendous weight of this evidence. Because ABC fails to show that Region 5's permitting decision is clearly erroneous in any way, its Petition for Review should be denied.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE WITH PAGE LIMITATION

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I hereby certify that on December 16, 2019, the foregoing was filed electronically with the Clerk of the Environmental Appeals Board using the EAB eFiling System, and is also being served via U.S. Mail in hard copy on the following:

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