

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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ORAL ARGUMENT

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IN THE MATTER OF:	:
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VEOLIA ES TECHNICAL	: CAA Appeal No.
SOLUTIONS, LLC,	: 19-01
	:
PERMIT NO.	:
V-IL-1716300103-2014-10	:
	:

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Tuesday,  
April 14, 2020

Video Teleconference

The above-entitled matter came on for hearing, pursuant to notice, at 10:30 a.m.

BEFORE:

THE HONORABLE AARON P. AVILA  
Environmental Appeals Judge

THE HONORABLE KATHIE A. STEIN  
Environmental Appeals Judge

## APPEARANCES:

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**ALSO PRESENT:**

**EURIKA DURR, Clerk of the Board**

**CATHERINE MALININ DUNN, Senior Counsel for the  
Board**

**NOHA HAGGAG, Counsel for the Board**

**DAVID KLARICH, Veolia ES Technical Solutions, LLC**

**DENNIS WARCHOL, Veolia ES Technical Solutions,  
LLC**

1 P-R-O-C-E-E-D-I-N-G-S

2 10:30 a.m.

3 MS. DURR: The Environmental Appeals  
4 Board of the United States Environmental  
5 Protection Agency is now in session for oral  
6 argument in re Veolia ES Technical Solutions,  
7 LLC, Permit Number V-IL-1716300103-2014-10, CAA  
8 Appeal Number 19-01. The Honorable Judges Aaron  
9 Avila and Kathie Stein presiding. No recording  
10 devices allowed.

11 JUDGE AVILA: Good morning, everyone.  
12 This is Judge Avila. Judge Stein, are you able  
13 to turn your audio and video on?

14 (No audible response.)

15 JUDGE AVILA: Well, let's do the roll  
16 call. Firstly, let's make sure I've got everyone  
17 else on the phone. Hopefully Judge Stein's video  
18 and audio will start working here shortly. So  
19 for Petitioner we have Ms. Hubertz? If you could  
20 --

21 MR. HUBERTZ: I forgot I was muted.

22 JUDGE AVILA: Yeah, if the counsel who

1 are going to be arguing, if you could unmute your  
2 phone and turn your video on just for this  
3 portion, so we can make sure it's working  
4 properly, that'd be great. For EPA Region 5, we  
5 have Mr. Krallman?

6 MR. KRALLMAN: Yes, Office of General  
7 Counsel.

8 JUDGE AVILA: Yes, and Ms. Garypie  
9 also?

10 MS. GARYPIE: Yes.

11 JUDGE AVILA: Mr. David Ogulei?

12 MR. OGULEI: Yes.

13 JUDGE AVILA: Mr. Spangler?

14 MR. SPANGLER: Yes.

15 JUDGE AVILA: And for Veolia, arguing  
16 counsel is Mr. Kellmeyer?

17 MR. KELLMEYER: Yes.

18 JUDGE AVILA: And you also have Mr.  
19 Warchol?

20 MR. WARCHOL: Warchol.

21 JUDGE AVILA: Warchol, sorry.

22 MR. WARCHOL: Yes.

1 JUDGE AVILA: And Mr. Klarich?

2 MR. KLARICH: Yes.

3 JUDGE AVILA: And we also have a court  
4 reporter, Mr. Cordes? Are you there?

5 MR. WOJACK: It's Sam Wojack.

6 JUDGE AVILA: Oh, Sam Wojack, I'm  
7 sorry. I don't know what happened to my --  
8 anyway. And for the Board, we have Ms. Durr, the  
9 Clerk of the Board. Are you still there?

10 MS. DURR: I am.

11 JUDGE AVILA: We have counsel for the  
12 Board, Ms. Haggag?

13 MS. HAGGAG: I'm here.

14 JUDGE AVILA: And Senior Counsel for  
15 the Board, Ms. Malinin Dunn?

16 MS. MALININ DUNN: Yes, I'm here.

17 JUDGE AVILA: Okay. Judge Stein -- oh,  
18 we also have Ms. Costello and Mr. Michael Hardy  
19 from EPA to help with any technical problems we  
20 may have.

21 Judge Stein, have you been able to get  
22 your video and audio to work?

1 JUDGE STEIN: Yes, I had to re-log in.  
2 Can you see me now?

3 JUDGE AVILA: I can't see you. Now,  
4 there we go.

5 JUDGE STEIN: Yeah, I'm sorry. My  
6 computer camera blocks half of the image, so I'll  
7 do my best, but I do appear to be back in now.

8 JUDGE AVILA: Well, thank you,  
9 everyone. This is the first time the  
10 Environmental Appeals Board is conducting an oral  
11 argument by Skype, and so on behalf of the Board,  
12 I'd like to thank everyone for working with the  
13 Board to make this happen, given the current  
14 circumstances. We anticipate this will go  
15 smoothly. We've had one little hiccup, but if we  
16 encounter any technical difficulties, please bear  
17 with us. Like I said, we have technical folks on  
18 the line, at least for the beginning here, to  
19 make sure things go smoothly.

20 With that, I'd like to just reiterate  
21 the Environmental Appeals Board is hearing an  
22 oral argument today on a petition for review of a

1 Clean Air Act Title V permit that EPA Region 5  
2 issued to Veolia Technical Solutions, LLC.  
3 Petitioner is the American Bottom Conservancy.  
4 Today's argument will proceed as outlined in the  
5 Board's March 30th order.

6 We'll hear first from the Petitioner,  
7 then EPA Region 5, then Veolia. Finally, if the  
8 Petitioner wants to reserve time for rebuttal --  
9 and you can reserve up to 10 minutes -- we'll  
10 hear from Petitioner on rebuttal. On behalf of  
11 the Board, I'd like to express our thanks very  
12 much for the time and effort that you've expended  
13 in connection with briefing on this petition, and  
14 for preparing it for and participating in this  
15 oral argument, as well as the logistics leading  
16 up to this oral argument.

17 Oral argument is an important  
18 opportunity for you to explain your contentions  
19 and the important issues in this case to the  
20 Board. It is also an opportunity for the judges  
21 to explore with you the contours of your  
22 arguments and the issues in this case. You



1 should assume that we have read the briefs and  
2 other submissions, and therefore are likely to  
3 ask questions that will assist us in our  
4 deliberations.

5           You should not assume that the judges  
6 have made up their minds about any of the issues  
7 in this case, but instead, we are using this as  
8 an opportunity to listen, to help us understand  
9 your position, and to probe the legal and record  
10 support on which the Region based its permit  
11 decision. As the clerk mentioned, there is no  
12 recording of any kind allowed. We do have a  
13 court reporter transcribing the oral argument,  
14 and the transcript of the argument will be posted  
15 to the docket in this matter.

16           We'll now proceed with the oral  
17 argument. If you're not presenting an oral  
18 argument at the time, if you could turn off your  
19 video and mute your microphone, that'd be  
20 appreciated so that we only have arguing counsel  
21 up, and Judge Stein and myself. Also, we don't  
22 have a timer that everyone can see, so the Clerk

1 of the Board will inform you when you have five  
2 minutes remaining in your allotted time.

3 So with that, let's proceed with the  
4 oral argument and counsel for the Petitioner.

5 MS. HUBERTZ: Good morning, Your  
6 Honors. I am Elizabeth Hubertz, and I represent  
7 American Bottom Conservancy. In our petition, we  
8 argue that Region 5's 2019 permit decision, the  
9 Title V permit, the decision to eliminate multi-  
10 metals monitoring and to weaken the feed stream  
11 analysis provisions was arbitrary and capricious.

12 This did not happen in a vacuum. This  
13 happened against the background of the 2017  
14 version of the permit, which was the result  
15 itself of approximately four years of fact-  
16 finding, testing and other aspects, things that  
17 went into the administrative record.

18 JUDGE AVILA: On that, can I ask a  
19 threshold question of our standard of review  
20 here? You made an argument based on Fox, and I'm  
21 just not sure why we should follow anything other  
22 than the typical clearly erroneous standard

1 that's set forth in the governing regulation.  
2 Our clearly erroneous standard also encompasses a  
3 considered judgment element. So why shouldn't we  
4 just apply that?

5 MS. HUBERTZ: I'm not sure it will make  
6 that much of a difference. What I called the Fox  
7 Doctrine starts in State Farm, which has the same  
8 sort of considered judgment and clearly erroneous  
9 rulings for arbitrary and capricious. Really,  
10 the Fox line of cases stands for the idea that  
11 when you're reviewing a change in position as  
12 opposed to an initial position, the reasons for  
13 the change have to make sense, as well.

14 JUDGE AVILA: I was looking at some of  
15 our case law, and the General Electric case and  
16 Pio Pico, and I guess in those circumstances, I  
17 wasn't seeing, given the argument you're making  
18 in this case, how you were invoking Fox seemed to  
19 also square with that line of cases.

20 MS. HUBERTZ: Again, I think that it's  
21 really just a determination that the current  
22 permit is based on facts that are in the record,

1 and that there's a reason for finding the facts  
2 as they have now been found instead of as they  
3 were found two years ago.

4 JUDGE AVILA: Thank you.

5 JUDGE STEIN: This is Judge Stein. So  
6 the final permit that was in effect before was  
7 the 2018, was a 2008 permit, excuse me, and the  
8 2017 permit was a final permit issued by the  
9 Region, but it was challenged by Veolia on  
10 appeal. Therefore, there was never an  
11 opportunity that came to fruition for the Board  
12 to adjudicate the parties' respective arguments  
13 with respect to the 2017 permit.

14 So how, if at all, should that affect  
15 how we now look in 2019, because the 2017 permit  
16 was not a final permit, but the final permit that  
17 preceded the current permit was in 2008?

18 MS. HUBERTZ: The way I understand it  
19 is that the regional permit is final for purposes  
20 of your review. So when it was appealed, that  
21 was a valid appeal and it was settled before it  
22 could be brought to fruition. So how does that

1       affect the current? I think basically Veolia was  
2       in my position last time, arguing that there was  
3       no factual basis for the decision. Now that the  
4       opposite facts have been found, now I'm the one  
5       arguing that there's no factual basis for its  
6       decision. I'm not exactly sure how that works  
7       its way out with the fact that there was a  
8       settlement, but that's my understanding.

9                 JUDGE STEIN: I guess the only point I  
10       was trying to make is that, as we look at the  
11       totality of the record in this case, which  
12       obviously includes both things relating to the  
13       2017 and the 2019 permit, I think the point I was  
14       trying to make is that there was no final  
15       determination by the Board with respect to the  
16       permit, what you're referring to as the 2017  
17       permit.

18                 I think that's the only point that I  
19       was trying to make, not that there were not facts  
20       in the record with respect to the proposed permit  
21       and a response to comments, but that that  
22       adjudication had not taken place.

1 MS. HUBERTZ: Okay, and that is  
2 correct. It was settled before the Board could  
3 adjudicate the matter. All right, so I've said  
4 that there's not a factual basis in the record,  
5 so let's look at the reasons that EPA Region 5  
6 gave for its decision to eliminate the multi-  
7 metals monitoring. The first reason it gives,  
8 around page 8, I think, of the Statement of  
9 Basis, is that they were really concerned all  
10 along about mercury, and really that the SVM and  
11 LVM was just a sideline.

12 Now that mercury has been resolved,  
13 and that's something that ABC is not disputing,  
14 they put controls on it for mercury, but not SVM  
15 -- now that EPA's, if I understand their  
16 position, it's now they've put those controls on,  
17 we don't need to worry about SVM and LVM, and  
18 saying that they were never really worried about  
19 them before at all. I don't think that's an  
20 accurate reading of the record. I think that EPA  
21 was very clear before that it was concerned with  
22 both SVM, LVM and mercury.

1 I think the facts also back up that  
2 they were both a concern. For example, the NEIC  
3 report, one on the chart of the extreme  
4 discrepancies that formed the basis of its  
5 findings, one was related to mercury, and the  
6 rest were either totality of metals or cadmium or  
7 chromium, which are LVM and SVM. So it's not  
8 really true to say that there was nothing about  
9 them in the record.

10 JUDGE STEIN: Can I ask you a different  
11 question?

12 MS. HUBERTZ: Yes.

13 JUDGE STEIN: Given that there was one  
14 exceedance and one near-exceedance of the low-  
15 volatility and the semi-volatile metals in the  
16 record back in 2006 and 2008, and so the  
17 subsequent retests that were conducted. The  
18 tests showed that those numbers were well below  
19 the limit. What evidence is there that the  
20 permit is not sufficiently protective.

21 I don't dispute that back in 2006 and  
22 2008, there was one exceedance and one near-

1 exceedance, but we're now at least 10 years later  
2 with retests and subsequent tests. So can you  
3 describe for me now what evidence is there that  
4 the permit is not sufficiently protective with  
5 respect to semi-volatiles and low-volatility  
6 metals?

7 MS. HUBERTZ: Right. Back in 2017, EPA  
8 faced the same questions, and pointed out that it  
9 wasn't just the exceedances. It was the fact  
10 that there was no relationship between SVM levels  
11 and feed rate and VL concentration levels in  
12 relation to the standard. That was true even  
13 after the retest. In 2006, they retested Unit 3,  
14 came back positive again. Rechecked them for LVM  
15 in 2008. (Telephonic interference)

16 So in that case, I understand there's  
17 some dispute about exactly how similar the two  
18 are, but that supports the idea that we don't  
19 really understand how and how much what the  
20 relationship the feed rate is to the emission.

21 I understand, too, that if they -- The  
22 EPA has now said, well, it's in a narrow band,



1 but really the only time it was in that narrow  
2 band on all of the units was the 2013 CPT, which  
3 is good, but it's one data point. Yes?

4 MR. WOJACK: I just had an audio glitch  
5 and my audio has gone down. I need to determine  
6 what's going wrong with that, unless there is an  
7 audio recording of this being made right now by  
8 someone else.

9 JUDGE AVILA: Well, there should not  
10 be, so we'll take a brief moment to try to fix  
11 that?

12 MR. WOJACK: Yes.

13 MS. HUBERTZ: How much time do I have  
14 left?

15 JUDGE AVILA: Clerk of the Board, how  
16 much time is left?

17 MS. DURR: She's got 20 minutes. I put  
18 30 minutes on the clock because you didn't --

19 MS. HUBERTZ: I reserve my 10 minutes  
20 then.

21 MS. DURR: You're going to reserve it?

22 MS. HUBERTZ: Yes.

1 JUDGE STEIN: If the court reporter  
2 can't hear, we shouldn't be having further  
3 conversation right now, please.

4 JUDGE AVILA: Yes.

5 (Whereupon, the above-entitled matter  
6 went off the record at 10:46 a.m. and resumed at  
7 10:49 a.m.)

8 MS. HUBERTZ: Over the break while the  
9 court reporter was out, I asked how much time I  
10 have left. It seems I'm at 20 minutes, and I  
11 would like to reserve 10 minutes for rebuttal.

12 MS. DURR: You have 10 minutes.

13 MS. HUBERTZ: Thank you.

14 JUDGE AVILA: Before we launch back  
15 into things, I just wanted to clarify one thing.  
16 I read your petition at Page 7. What multi-  
17 metals monitoring are you saying should be in  
18 place? Is it just for the SVM and LVM?

19 MS. HUBERTZ: Yes. I understand it  
20 will also monitor mercury. I don't think you can  
21 just select for SVM and LVM. It would be the  
22 parametric monitoring that was in the 2017

1 permit, not for compliance, but as a check  
2 against the feed rates from the CPT.

3 JUDGE AVILA: Is there any evidence in  
4 the record that shows that this multi-metals  
5 monitoring would be effective at Veolia's  
6 facility and whether it's been used anywhere  
7 else?

8 MS. HUBERTZ: There is. Veolia has  
9 repeatedly raised those issues with EPA, and EPA  
10 has responded with examples of other places where  
11 it's been used successfully. Veolia has issues  
12 with all of those, but I think the record does  
13 support that this is a viable means of  
14 monitoring.

15 JUDGE AVILA: Is there anywhere  
16 specific in the record that supports?

17 MS. HUBERTZ: A lot of it is in the  
18 2017 RTC. I can go back and give you specific  
19 cites if that would help.

20 JUDGE AVILA: Yeah, that's fine.  
21 Sorry, go ahead.

22 JUDGE STEIN: I wanted to go back to

1 the question you were answering when the court  
2 reporter raised some concerns about the audio  
3 quality, because you were starting to talk about  
4 the 2013 CPT. But I don't know if you completely  
5 finished your answer to my question, which was,  
6 given that there had been subsequent retests  
7 which showed that emissions were well below the  
8 limit, what evidence is there that the permit is  
9 not sufficiently protective? Was there anything  
10 else you had to say on that question?

11 MS. HUBERTZ: I was talking, and my  
12 response was talking about the results of the  
13 2008 CPT for LVM when both Units Two and Three  
14 were outside of the narrow band at like 23 and  
15 60-something percent. So that is not evidence of  
16 an exceedance, but evidence that there is a lack  
17 of understanding of the relationship between the  
18 feed rate and the emissions.

19 It was on this basis that EPA's 2017  
20 permit rested, especially given the very large  
21 discrepancies in SVM and LVM metals that its  
22 former feed stream analysis program was allowing

1 through.

2 JUDGE STEIN: But since then we've had  
3 the 2013 CPT, and we have in the record, although  
4 they weren't expressly relied on -- and I'll ask  
5 the Region this -- the 2018 CPT test, and none of  
6 those CPT tests seem to show anything similar to  
7 what you were seeing in 2006 and 2008. So I'm  
8 wondering what you have that you can point us to  
9 in the record post-2006 and 2008 that shows that  
10 the facilities, that the limits, that the permit  
11 is not sufficiently protective.

12 MS. HUBERTZ: My example that I gave in  
13 the brief, and I'll talk about it here is that  
14 we've got four CPT tests. So we have 2006, 2008,  
15 2013 and 2018, which isn't really part of the  
16 EPA's deliberation. So there are exceedances and  
17 near exceedances at one of the units in three out  
18 of those four. There was a near exceedance of  
19 mercury. They caught it in time. They were able  
20 to do a third run that solved the problem.

21 There always seems to be a problem is  
22 part of our -- I don't think that the emissions

1 and their relationship between CPTs and feed  
2 streams are well understood, and I think that  
3 there seems to be -- every time a measuring  
4 device goes on the stack, there's some kind of  
5 problem. It's a one-off problem, and now we have  
6 another one-off problem. I just don't think, and  
7 this was EPA's former conclusion, that that's  
8 protective when we don't know what's going on in  
9 the day-to-day life. I mean, they prepare for  
10 these CPTs, everything is cleared in advance. A  
11 third party does it, and still have problems.

12 MS. DURR: Five minutes.

13 JUDGE STEIN: So can you talk about the  
14 evidence in the record with respect to the  
15 arsenic spike in 2009 in the ambient air levels,  
16 and what evidence is in the record that links  
17 this facility to that spike?

18 MS. HUBERTZ: Yeah, the evidence in the  
19 record that EPA relied on in 2017 is a report,  
20 and again, I don't think I have the numbers.  
21 There were two separate documents that I confused  
22 before, but one is the actual test that measured

1 the spike. That was a rotating or mobile ambient  
2 air monitor that was in several places in the  
3 greater St. Louis area. And then there was a  
4 report based on this that used wind direction to  
5 look at who might be responsible for the arsenic  
6 spike. So that's what it rests on.

7 JUDGE AVILA: Now I had one last  
8 question on the multi-metals monitoring. I know  
9 you talked about the variability between the  
10 units, but I thought there was also some  
11 suggestion that there was, because of variability  
12 in the waste stream, there was concerns about  
13 emissions. Am I right about that? Is that part  
14 of your argument?

15 MS. HUBERTZ: Yes, it is, that Veolia  
16 has a uniquely varied waste stream when compared  
17 to its industry peers. One of the examples given  
18 was Ross, another incinerator in Region 5, has 10  
19 percent unique waste streams, whereas Veolia has  
20 70 percent unique waste streams. That's part of  
21 what I mean by day-to-day operations. Let me  
22 know exactly what you're putting in during a CPT,

1 and it still messes up a lot of the time. When  
2 you don't know what's going in because you're not  
3 doing the right amount of testing, you really  
4 don't know whether or not you're in compliance.

5 JUDGE AVILA: But I guess my question  
6 then is if the CPTs are supposed to be the  
7 operating conditions that represent the extreme  
8 range of normal, why would a variability in the  
9 feed stream matter? Presumably the CPTs take  
10 into account the extreme range. No one has said  
11 the CPTs -- I haven't read anyone that argues  
12 that CPTs were done incorrectly.

13 MS. HUBERTZ: I don't know that they  
14 take into account the extreme range that the NEIC  
15 found in 2012. These are things are like where  
16 one waste stream analysis report or profile said  
17 there was 1 mg/kg, and then another one said  
18 there was 99,000 mg/kg. I don't know that that  
19 level of extreme outlyingness is being tested. I  
20 don't think anyone has said that it has.

21 JUDGE AVILA: I think we're probably  
22 almost out of time, so let me give you a few



1 minutes to talk about the feed stream analysis  
2 procedure, and in particular, I guess one thing  
3 I'm not clear on is what is the Conservancy  
4 arguing that the proper procedure should be, in  
5 your opinion?

6 MS. HUBERTZ: Not having suspect waste,  
7 the non-suspect waste category. We're afraid  
8 that that's just going to be a bin that things  
9 get tossed into, and that was exactly the problem  
10 that resulted in the feed stream analysis in the  
11 first place. Veolia had this dynamic suspect  
12 list of waste loads that they thought had metal  
13 in them, so they test those. Then a whole bunch  
14 of other things that they thought didn't have  
15 metal in them, and as it turns out they did, at  
16 least according to the NEIC report.

17 We're worried about that same problem  
18 happening. And I agree, it's great that they're  
19 testing more, even if it's not that much, but --

20 JUDGE AVILA: So you agree that they're  
21 testing more than under the 2008 permit?

22 MS. HUBERTZ: I think we have to agree

1 to that.

2 JUDGE AVILA: Okay. The 2017 permit  
3 decision still didn't require testing of all  
4 waste, right?

5 MS. HUBERTZ: That's right, it did not.

6 JUDGE AVILA: So where does this fall  
7 between, in the Conservancy's view, where does  
8 this fall with respect to the 2019 permit, where  
9 does that fall in the continuum of the 2008,  
10 2017, and what you want or what you think is  
11 appropriate?

12 MS. HUBERTZ: Okay, so in 2017 there  
13 was both the feed stream analysis program,  
14 enhancing stream analysis provisions, and the  
15 multi-metals monitoring, and those worked in  
16 tandem. So now you've removed the multi-metals  
17 monitoring. We're not worried about SVM and LVM  
18 anymore.

19 MS. DURR: Time.

20 JUDGE AVILA: Yes, you can answer.

21 MS. HUBERTZ: And also at the same  
22 time, weakened the provisions for testing without

1 really saying why they did that.

2 JUDGE STEIN: Can everyone else be on  
3 mute, because there's background noise?

4 MS. HUBERTZ: Oh, I thought that was  
5 the alarm.

6 JUDGE STEIN: Oh, maybe it is the  
7 alarm.

8 MS. DURR: It was, I'm sorry.

9 JUDGE AVILA: Go ahead. You can  
10 complete your answer.

11 MS. HUBERTZ: Where is it in between?  
12 So I regard 2019 as being in between 2017 and  
13 2008, not as good as the 2017 permit, which we  
14 did not really have a lot to say about in our  
15 comments, but not as bad as the 2008. Again, I  
16 think that's a fact that I have to admit. They  
17 are now testing and they have a better regime for  
18 testing more things. Still don't like the  
19 reliance on generator profiles just because it  
20 seems that there are a number of errors based on  
21 the NEIC investigation, but at least they're  
22 going to be doing additional testing in both 2017

1 and 2019.

2 JUDGE AVILA: Judge Stein, did you have  
3 any other questions? You may be on mute. We  
4 can't hear you.

5 JUDGE STEIN: No, I'll save my further  
6 questions for rebuttal.

7 JUDGE AVILA: Okay. Thank you very  
8 much, Counsel. Clerk, how far over did we go?  
9 Did we go like 10 minutes over the time?

10 MS. DURR: Yes.

11 JUDGE AVILA: So I would say is let's  
12 give the Region an additional five minutes and  
13 Veolia an additional five minutes to keep the  
14 time even, so the Region will have 25 minutes and  
15 Veolia will have 15 minutes.

16 MS. DURR: Okay.

17 JUDGE AVILA: With that, Mr. Krallman?

18 MR. KRALLMAN: Yes. Good morning, Your  
19 Honors. It's John Krallman on behalf of Region  
20 5, from the Office of General Counsel. I want to  
21 start by, I think, re-framing what the question  
22 the Board should be considering is, which is the

1 question of whether this Title V permit includes  
2 sufficient monitoring, record-keeping and  
3 recording to assure compliance with the  
4 underlying numerical emission limits.

5 As Judge Stein pointed out, this  
6 permitting action is actually replacing the 2008  
7 permitting action. While the 2017 permitting  
8 action may be relevant, I think comparisons  
9 between 2017 and 2019 is not the question the  
10 Board should be answering. Fox really doesn't  
11 apply in this circumstance here. I don't think  
12 the Board should be applying that kind of  
13 standard, but even if it did, the Supreme Court  
14 made clear in Fox that the standard for reversing  
15 the decision isn't really different than the  
16 standard for making a decision in the first  
17 place.

18 You still have to fully explain the  
19 reason behind your decision, and that does  
20 include recognizing that it's a different  
21 decision, and in making that decision you're  
22 explaining that that's the decision you want to

1 make. So I don't think it really provides a  
2 different standard. The question here is looking  
3 at the --

4 JUDGE STEIN: Let me interrupt you for  
5 a second.

6 MR. KRALLMAN: Yes, Your Honor.

7 JUDGE STEIN: But under the Board's  
8 considered judgment standard and clear error  
9 standard, you're not disputing, are you, that as  
10 part of what we would look at, that the Board,  
11 you know, would look at what occurred in 2017 and  
12 look at what occurred in 2019, and expect the  
13 Region or EPA to explain what might be perceived  
14 as potential inconsistencies or contradictions?  
15 You're not disputing that that's part of the  
16 clear error considered judgment standard that the  
17 Board has applied for years, are you?

18 MR. KRALLMAN: Not at all, Your Honor.  
19 I think it's just a slightly different re-  
20 framing, and the issue is not is the Region  
21 removing the requirement for multi-metal  
22 monitoring CEMs. But based on the record before

1 it, is it required to add it to this permit? So  
2 it's not a question of comparing what changes the  
3 Region made from 2017 to 2019, but looking at the  
4 record as a whole, which does include the  
5 analysis the Region did in 2017 and their  
6 reevaluation of the evidence under the changed  
7 circumstances in 2019.

8 JUDGE STEIN: Can you help me out here,  
9 because as I was looking at the 2017 record, I  
10 was looking at a list of site-specific facts that  
11 were relied on by the Region to add the multi-  
12 metals monitoring. As I understand it, in 2017,  
13 the Region purported to exercise discretionary  
14 authority under 63.1209(g)(2), or alternatively,  
15 the statutory mandate of 504(c) to add that  
16 monitoring. But that type of monitoring, am I  
17 correct, is not something that is standard as  
18 part of a Title V permit?

19 MR. KRALLMAN: You're correct, Your  
20 Honor. The process that the Region was putting  
21 together in the 2017 permit would have been a  
22 unique process that had not been done before,

1 either for hazardous waste incinerators or for  
2 other sources that I'm aware of generally. The  
3 idea of trying to establish parametric monitoring  
4 using a multi-metal CEMS would've been a first  
5 time to do that. But the Region felt at the time  
6 that the underlying facts justified that, but the  
7 underlying facts here have changed.

8 JUDGE AVILA: Can you just step through  
9 exactly what you think the material change in  
10 facts are?

11 MR. KRALLMAN: The main one is the  
12 addition of the activated carbon injection to  
13 control vapor phase mercury, which was previously  
14 uncontrolled from Units Two and Three. Based on  
15 that, a fair reading, I think, of the 2017  
16 permitting action was there was an overall great  
17 concern about variability in emissions from  
18 Veolia, concerns about variations in waste  
19 streams. The 2017 permit was looking back at the  
20 concerns from the 2008 permit, and so that for  
21 the Region justified a more robust feed stream  
22 analysis plan and the use of multi-metal



1 monitoring CEMS.

2 But if you look closely at the  
3 concerns about that variation, there was concerns  
4 generally about variation, but specifically  
5 pointing to the variation in mercury, which fed  
6 the same amount during CPTs, varied from 37  
7 percent to 75 percent. The Region was concerned  
8 that because of that variation, it was unclear  
9 whether the operating parameter limits would  
10 actually control below that level.

11 The Region also pointed to variations  
12 in SVM and LVM to justify multi-metal CEMS. In  
13 2019, with the addition of the activated carbon  
14 injection to control vapor phase mercury, that  
15 variation in mercury was less of a concern  
16 because the Region expected that the emission  
17 levels would be much lower. The Region then went  
18 back and looked at the variation SVM and LVM and  
19 found that those levels, while they did vary,  
20 varied at a low band. So that variation really  
21 wasn't of as much concern for making sure that  
22 the permit assured compliance with the numerical

1 emission limits.

2 JUDGE AVILA: When you say there was a  
3 low band for the SVM and LVM variation, do you  
4 mean there was -- you referenced 37 to 75 percent  
5 for the mercury. Are you saying that the  
6 differences were -- the variability wasn't as  
7 great, or the emissions were so low, any  
8 variability doesn't really matter?

9 MR. KRALLMAN: The latter, Your Honor.  
10 The variability was maybe, probably, if you  
11 looked at it overall, was comparable, but the  
12 difference was that the SVM and LVM were varying  
13 from something like two percent of the standard  
14 to six percent of the standard, or four percent  
15 of the standard to 11 percent of the standard.  
16 So despite the fact that there were variations,  
17 and it was double given the different units, that  
18 variation didn't really impact whether or not  
19 they were sharing compliance with the numerical  
20 emission limits.

21 JUDGE AVILA: Can I just go back to --  
22 I think this was also part of Judge Stein's

1 question and your answer -- I take it that under  
2 the Administrator's decision in CITGO, the  
3 presumption is that any reporting requirements in  
4 the regs are sufficient -- presumption may be too  
5 strong a word, but we're beyond that step of the  
6 process and now this multi-metals monitoring  
7 would be in the last step of CITGO, right? Am I  
8 correct about that?

9 MR. KRALLMAN: In this instance, it  
10 would be. I think that in 2017, the way to read  
11 that is the Region was using discretionary  
12 authority within the regs, and alternatively was  
13 getting to the second step of looking at whether  
14 they needed to supplement monitoring under Title  
15 V and pointing to both of them. In this  
16 instance, we're just looking at the CITGO  
17 evaluation and looking at that. One of the  
18 several changes is, is there likelihood of a  
19 violation? In this instance, because of low  
20 band, the Region didn't feel that there was a  
21 likelihood of violations.

22 The other big change is the addition

1 of control equipment, which pollution control  
2 equipment is one of those things that you  
3 evaluate under CITGO, is whether there is control  
4 equipment. Previously in 2017, there was no  
5 control equipment for vapor phase mercury, and  
6 now there is. So these are significant changes  
7 in the underlying record that justify the  
8 decision not to supplement monitoring beyond what  
9 the region is doing in the enhanced feed stream  
10 analysis plan, which is a significant step up  
11 from the 2008 plan that this permitting action is  
12 actually replacing.

13 JUDGE AVILA: Is the feed stream  
14 analysis, though, it's a significant step up from  
15 2008, but how would you characterize it as  
16 relating to what was contemplated in the 2017  
17 permitting decision?

18 MR. KRALLMAN: It is different. I  
19 don't think that it is a significant change from  
20 the 2017 FAP. There was the addition of non-  
21 suspect waste to the idea, but it still requires  
22 testing of non-suspect waste on a regular basis.

1 These are waste streams that had -- it's intended  
2 to be -- it's very clear these shouldn't be  
3 containing metals, so it's things like expired  
4 pharmaceuticals or off-batch pharmaceuticals, and  
5 feed streams like that, but they still require  
6 testing of initial and testing every 12 months.

7           There were additions for some  
8 exceptions from testing for things like worker  
9 safety, where it just isn't safe to test, and for  
10 things that are legally problematic to test, such  
11 as DEA drug disposals. Part of that is the  
12 Region set up a reasonable process, adding to  
13 those exceptions as new things come up, allowing  
14 the Region 30 days to review it and to request  
15 more information. If the justification Veolia  
16 provides for adding a new exception isn't  
17 sufficiently justified, the Region can ask for  
18 more information before Veolia can move forward  
19 with that.

20           That balances both the desire under  
21 RCRA to swiftly dispose of hazardous waste and  
22 the concerns under the Clean Air Act of ensuring

1 that we're providing adequate monitoring for  
2 those things. So I think that that was a  
3 legitimate balancing that the Region did in that  
4 instance as part of the modifications.

5 JUDGE AVILA: So do you think the feed  
6 stream analysis procedures in the 2019 permit  
7 addressed the problems that were identified in  
8 the NEIC 2012 report?

9 MR. KRALLMAN: I do believe that they  
10 address many of those problems that were  
11 identified in the 2013 NEIC report. It's  
12 important to remember that that NEIC report was  
13 an evaluation of what Veolia was doing based on  
14 the 2008 feed stream analysis plan, so some of  
15 the concerns there are alleviated by the enhanced  
16 feed stream analysis plan.

17 The Petitioner hasn't really pointed  
18 out where the provisions in this feed stream  
19 analysis plan don't address those concerns.  
20 They've just raised those concerns and said oh,  
21 these are concerns, but they haven't said what  
22 provisions of the 2019 feed stream analysis plan

1 don't go to address those concerns. There is a  
2 requirement for much more robust testing of  
3 suspect waste. There is a requirement to test  
4 non-suspect waste on a regular basis, and to  
5 adjust what the expected metal content of those  
6 waste streams are.

7 I'd also point out that depending on  
8 what the content is, even if they're testing  
9 below the method detection limits, Veolia has to  
10 assume either half the detection limit or the  
11 detection limit. So they're actually over-  
12 estimating in some instances the amount of metals  
13 that are being fed into their incinerators.

14 JUDGE AVILA: Can you just give me some  
15 sense of how, at a typical facility, how much  
16 testing of the feed stream is done in your run of  
17 the mill study? Because I always thought of RCRA  
18 as a cradle to grave, the hazardous waste  
19 manifest was what everyone went by.

20 MR. KRALLMAN: I honestly, Your Honor,  
21 couldn't necessarily answer. I haven't compared  
22 other permits to this permit, but I would agree

1 that the reliance on the generator profile is a  
2 big part of RCRA and is part and parcel of a  
3 Congressional decision that generators are in the  
4 best spot to be able to determine what is  
5 actually in the waste that they're generating,  
6 and to require TSDs to reevaluate and retest  
7 every single sample is simply, I think,  
8 inconsistent with RCRA.

9 JUDGE AVILA: I've bounced around on  
10 you, I apologize, but I wanted to get some  
11 clarification on something in the Statement of  
12 Basis for the 2019 permit, which is Page 11 of  
13 the Statement of Basis. It says even if large  
14 spikes in SVM and LVM emissions were to occur,  
15 given the margin of compliance demonstrated by  
16 the CPT, EPA agrees that the enhanced feed stream  
17 analysis procedures in this draft permit, and  
18 then this is the part I'd like some explanation  
19 on, in conjunction with other monitoring  
20 requirements specified in the draft permit will  
21 be sufficient to assure compliance with the SVM  
22 and LVM emission limits.



1 I was wondering what those other  
2 monitoring requirements specified in the draft  
3 permit are.

4 MR. KRALLMAN: Right, so the permit as  
5 a whole sets up, so you start with the CPT, the  
6 Comprehensive Performance Test, which is run at  
7 the extreme level of operations, so basically at  
8 or near maximum capacity. Using that, you set  
9 operating parameter limits, OPLs. Those are  
10 things like residency times, temperature, flow  
11 rate, oxygen content. Those are the other  
12 monitoring parameters that we're talking about,  
13 is that you're not only monitoring the amount of  
14 metals that are being fed into the incinerator,  
15 but you're monitoring the operating parameters of  
16 that incinerator to essentially assure robust and  
17 complete combustion and good operating levels.  
18 So it's not only are you monitoring the input,  
19 but you're monitoring the operating parameters.

20 It's similar to say, monitoring the  
21 sulphur content in fuel oil, but also monitoring  
22 temperature and combustion practices. So that's

1 the dual approach that the Region was describing  
2 there, is not only are you doing better at  
3 monitoring what's going in, but you're also  
4 monitoring how the unit is operating.

5 JUDGE AVILA: I take it that the idea  
6 is that if the unit is operating as intended,  
7 then given the CPTs -- if you're monitoring the  
8 way the unit is operating as required by the  
9 permit, given the CPTs, if all those monitoring  
10 things stay within the permit limits, then the  
11 assumption is everything's okay.

12 MR. KRALLMAN: Yes. I think that's  
13 very comparable, while it's a more complicated  
14 process, it's very comparable to say, stack tests  
15 or a coal fired power plant. Part of that is  
16 you're also requiring certain operating  
17 parameters within the permit for that facility so  
18 you know that it's still in good operation. I  
19 will add, though, that for this permit and these  
20 operating parameters, there is actually automatic  
21 shutoffs, where under certain circumstances if  
22 you're not meeting those OPLs, the permit

1 actually requires the facility to shut down the  
2 operation. So it's even more robust than most  
3 other types of industries or facilities, I would  
4 say.

5 JUDGE STEIN: I have a number of  
6 questions, primarily relating to the multi-metals  
7 monitoring. Judge Avila, were you finished with  
8 that line of questioning?

9 JUDGE AVILA: Yes, go ahead, sorry.

10 JUDGE STEIN: So mine are a little bit  
11 across the board, but in looking at the other  
12 site-specific facts that supported in 2017 the  
13 Region's determination of a need for multi-metals  
14 monitoring, one of the things they referred to  
15 was a 2009 arsenic spike that occurred a few  
16 miles away from the facility. I was wondering if  
17 you could walk me through how the Region or the  
18 Agency is now looking at that issue.

19 I see it briefly addressed on Page 22  
20 of your brief, referring to the response to  
21 comments at Note 43. But I'm wondering if you  
22 can speak to that question, because I think that

1 response to comments suggests that the commenter  
2 suggested that this was anomalous. I think if  
3 you go to the comment, I don't think that's what  
4 was suggested by the commenter. So if you could  
5 speak to the Agency's view of that arsenic spike  
6 and what role it now plays, if any, in the  
7 determination. But it was clearly something  
8 heavily relied on, or at least relied on in the  
9 site-specific facts for that monitoring.

10 MR. KRALLMAN: Right. So that spike in  
11 that study was part of the totality of the  
12 circumstances the Region felt, you know, along  
13 with everything else, justified the requirement  
14 to use multi-metal CEMS as a parametric  
15 monitoring device in the 2017 permit. Looking at  
16 it now, I would say that it's part of the  
17 totality of that permitting action, but it's  
18 circumstantial evidence that the Region was  
19 relying on. In this instance, because of the low  
20 levels that the Region is looking at now and the  
21 less concern about mercury, while it's still, I  
22 think, circumstantial evidence, it's not

1 sufficient to justify requiring the facility to  
2 spend millions of dollars on additional  
3 monitoring equipment.

4 JUDGE STEIN: That's arsenic spike, not  
5 a mercury spike, so how does the Agency today, or  
6 in the permitting record for this action, is it  
7 being considered anomalous? What's the basis for  
8 that?

9 MS. DURR: Five minutes.

10 MR. KRALLMAN: I would say that yes,  
11 the Agency is, at this point, the Region at this  
12 point is looking at that spike and comparing that  
13 spike in arsenic to the several CPTs that have  
14 been done at highest operation with the highest  
15 concentration of metals being fed in, seems that  
16 that was likely anomalous given the more robust  
17 competing evidence against that in this  
18 permitting record.

19 JUDGE STEIN: So let me ask you about  
20 that evidence, because the 2018 CPT results are  
21 in the record. The Region stated they didn't  
22 rely on them in making their decision. Can the

1 Board, since they are in the record, take notice  
2 of them as at least evidence that confirms the  
3 Region's decision? How should we be looking at  
4 that 2018 data? I'm a little confused by exactly  
5 what you said in your briefs.

6 MR. KRALLMAN: My understanding from  
7 the permitting decision as it relates to that  
8 2018 data is, while the Region had received the  
9 results of that report, they had not accepted the  
10 results at the time they were making the  
11 permitting decision. I would need to check to  
12 see whether the Region has now accepted those  
13 results. If they have, in that case, I would  
14 suggest that I think the Board could probably  
15 take notice of that because it was placed in the  
16 record.

17 JUDGE AVILA: How could it be in the  
18 record if the Region hasn't accepted the results?

19 MR. KRALLMAN: Because they had gotten  
20 the numbers. I don't think the Region relied on  
21 -- as the Region said, I don't think they relied  
22 on the results of the CPT to justify, but pointed

1 it to this is additional -- we've made our  
2 justification, this is additional evidence that  
3 we're aware of that supports us, but we're not  
4 relying on it.

5 JUDGE AVILA: But aren't there  
6 provisions in the 2019 permit that are based on  
7 the result that require Veolia to do things based  
8 on the results of that 2018 CPT?

9 MR. KRALLMAN: No. The Region, in  
10 issuing the permit, indicated that, I think, once  
11 it accepted the results of that CPT, you know,  
12 after analyzing it, it would need to reopen the  
13 permit to adjust the operating parameter limits  
14 based on the results of that 2018 CPT. So the  
15 operating parameter limits that are in the permit  
16 are not based on that 2018 CPT. They're based, I  
17 believe, on the 2013 CPT.

18 JUDGE AVILA: Right, fair enough. I  
19 thought there was something that required -- I'll  
20 see if I can find it, but I thought there was  
21 something that required Veolia to do something  
22 based on the result of that test.

1 MR. KRALLMAN: Yes, I think they were  
2 required to submit a permit modification based on  
3 the results of that test. The permit said do  
4 your CPT, and then you need to submit a permit  
5 application to adjust the permit terms to be in  
6 line with the results of that CPT. But I don't  
7 think there was anything else beyond that in the  
8 permit that was based on the 2018 CPT.

9 JUDGE STEIN: What, if any, is the  
10 relevance of the state-issued RCRA permit to this  
11 Title V permit?

12 MR. KRALLMAN: So there's overlap. The  
13 RCRA permit includes a waste analysis plan, which  
14 is very similar to the feed stream analysis plan.  
15 There is also adjustments, I believe, to the RCRA  
16 permit to account for the addition of the  
17 activated carbon injection systems, but other  
18 than that, they really are different programs.

19 There is some balancing that goes on  
20 in trying to balance the desire to assure  
21 compliance under the Clean Air Act with the  
22 desire under RCRA to swiftly dispose of hazardous



1 waste, and also the tension of do we test  
2 everything, or do we rely on generator  
3 information. So there's a little bit of  
4 relevance, but I don't think it is directly  
5 impactful on the Title V permit.

6 JUDGE STEIN: So --

7 JUDGE AVILA: Go ahead.

8 JUDGE STEIN: I'd like to continue. We  
9 can go over and make other adjustments. If the  
10 RCRA permit were to be modified to include  
11 emissions limits for metals, would that have any  
12 effect on the Title V permit, and would the Title  
13 V permit need to be reopened as a result?

14 MR. KRALLMAN: No, Your Honor, I don't  
15 believe so. The requirements of a RCRA permit  
16 are not under our regulations considered  
17 applicable requirements. The Title V permit only  
18 includes requirements under the Clean Air Act, so  
19 it would be an independent requirement for the  
20 facility. They'd have to meet both standards.  
21 I'm not quite sure what would happen if they  
22 conflicted out somehow, although I don't expect

1 that that would be the case. It would more  
2 likely be one of them would be more stringent  
3 than the other, and so by de facto, the facility  
4 would have to meet the more stringent limit.

5 JUDGE STEIN: One final question on  
6 this line of questioning about the intersection  
7 between the RCRA and the air process. Among the  
8 site-specific facts that were cited in the 2017  
9 permit was a risk assessment. I think -- related  
10 -- and I think it was cited related to mercury  
11 emissions, and that was cited on Page 24, I  
12 believe, of the response to comments. I  
13 understand by a reference on your website that  
14 that risk assessment may have been updated. Does  
15 that update have any bearing on this Title V  
16 permit?

17 MR. KRALLMAN: I don't believe it does,  
18 Your Honor. The reason we cited that in 2017 was  
19 essentially justification for why the Region was  
20 very concerned about mercury emissions and the  
21 variability, and why it was important to take a  
22 hard look at it. In this case, they looked at

1 the mercury emissions, and because of the  
2 addition of activated carbon injection and  
3 controls, determined that that is of less  
4 concern. So you don't necessarily even need to  
5 get to the other factors to be considered.

6 If you look under CITGO, you have  
7 likelihood of violation, the type of control  
8 equipment included, but that's obviously a non-  
9 exhaustive list. In looking at those first  
10 couple of factors in 2017, the Region said oh, we  
11 have concerns here. Looking at other factors,  
12 like the risk assessment or the fact that this is  
13 in an environmental justice community, those  
14 really push us over the edge to a certain extent.

15 Here, because of the addition of  
16 controls and less likelihood of a violation,  
17 those additional concerns really don't rise to a  
18 level to push the Region over the edge to add  
19 additional monitoring beyond the monitoring that  
20 they're adding in the feed stream analysis plan  
21 that updates and is much more robust than the  
22 2008 feed stream analysis plan.

1                   JUDGE STEIN: Thank you. Judge Avila,  
2 do you have anything else?

3                   JUDGE AVILA: I had one other question  
4 that I asked Petitioner's counsel. There's  
5 multiple variabilities that we've been  
6 discussing. One of the things in the 2017 permit  
7 decision was variability within the feed stream  
8 itself. I said well, it's the comprehensive  
9 performance test that's supposed to be the  
10 extreme range of normal conditions. Would that  
11 take into account the variability in the feed  
12 stream? I was wondering if you could enlighten  
13 me on that.

14                   MR. KRALLMAN: It does to a certain  
15 extent, because the CPT sets the maximum amount  
16 of metals that can be fed in. Given the fact  
17 that that is demonstrated in their brief Veolia  
18 is not nearly loading as much as that maximum  
19 level on a regular basis, any variation  
20 therefore, would be likely such that if there's  
21 variation in the metals contents, because they're  
22 at a much lower level than they're doing during

1 the CPT, that variation would be unlikely to lead  
2 to a violation.

3 In addition, they're doing more robust  
4 testing, and so more likely to catch that  
5 variation in metals amounts, and having to  
6 readjust and account for tests where they're  
7 showing high levels. They have to then start  
8 including that in what they consider to be the  
9 metals amounts from that waste stream. I'd also  
10 point out that I think one of the Petitioner's  
11 arguments is the variation in the metals contents  
12 in the waste streams means that there's likely to  
13 be a variation of metals in the non-suspect waste  
14 streams.

15 I just don't think that that  
16 correlates at all, and just want to point out  
17 that. The non-suspect waste streams are waste  
18 streams that you just wouldn't generally expect  
19 metals to be present at all, whereas the suspect  
20 waste streams are waste streams where you do  
21 expect and are likely to have, or have tested  
22 positive for metals. Those are much different

1 things, in my mind.

2 JUDGE AVILA: Thank you, Counsel.

3 Judge Stein, do you have anything else?

4 JUDGE STEIN: Yeah, I have one final  
5 question. I mean, we've talked about the fact  
6 that this is an environmental justice community.  
7 That was at least partly in play in some of the  
8 decisions that were made in 2017. In 2017, the  
9 tests that the Agency now characterizes as  
10 anomalous were known and relied on, and the  
11 retests that the Agency is now relying on had  
12 also taken place.

13 Why the difference in 2019, and you  
14 may think you've already answered this, but I  
15 want to hear it again or I want to be clear. In  
16 2017, much of what you are now saying about the  
17 low volatility metals, the semi-volatile metals,  
18 that information was known in 2017, and yet the  
19 Agency went with a different approach, and in  
20 fact, had rejected the kind of monitoring that  
21 the Agency eventually accepted. So what's  
22 different if all of this was known all along?

1                   MR. KRALLMAN: I think it's really,  
2                   Your Honor, a question of the totality of the  
3                   circumstances. Looking at the changes that have  
4                   been made both to update the feed stream analysis  
5                   plan, because in 2017 they were comparing 2008  
6                   and we're still doing that in 2019, is comparing  
7                   what the feed stream analysis plan was in 2008 to  
8                   what it is in this 2019 permit.

9                   In addition, there's the addition of  
10                  the activated carbon injection controls. So the  
11                  Region, in looking at the totality of the  
12                  circumstances, there was a lot of concern about  
13                  variation in 2017. That variation is still  
14                  there. We're not denying that there's still  
15                  variation in some of the waste stream metal  
16                  content, some of the emissions. The difference  
17                  is that in 2017, that variation in mercury was  
18                  significant and could've impacted compliance with  
19                  the numerical limits.

20                  Because the requirement for the Clean  
21                  Air Act is to assure compliance with the emission  
22                  limits, the Region felt along with all of the

1 other factors that additional monitoring was  
2 necessary. In 2019, because of the addition of  
3 the controls, that variation in mercury, while it  
4 may still be there, is of less concern. The  
5 concern about sharing compliance with the  
6 emission limits is not as significant after the  
7 addition of the more robust feed stream analysis  
8 plan. That's why, even though some of the facts  
9 are the same, the conclusions that the Region is  
10 reaching are different because of the change in  
11 the totality of the circumstances.

12 JUDGE STEIN: Thank you.

13 MR. KRALLMAN: Thank you.

14 JUDGE AVILA: Thank you, Counsel.

15 JUDGE STEIN: I have no further  
16 questions of Mr. Krallman.

17 JUDGE AVILA: I don't either. Clerk,  
18 how far did we go over on the time there?

19 MS. DURR: Ten minutes.

20 JUDGE AVILA: Okay, let's add that to  
21 the rebuttal time for Petitioner. We'll turn now  
22 to Mr. Kellmeyer for Veolia.



1 MS. DURR: Additional 10 minutes to the  
2 Petitioner.

3 MR. KELLMEYER: Good morning. My name  
4 is Joe Kellmeyer, and I represent Veolia ES  
5 Technical Solutions.

6 JUDGE AVILA: Just to be clear, Mr.  
7 Kellmeyer, you have 15 minutes.

8 MR. KELLMEYER: All right, thank you.  
9 Veolia provides safe disposal of hazardous waste  
10 created by others. Its client base includes  
11 EPCA, various surplus sites, and public and  
12 private entities, including Washington  
13 University, where Plaintiff's counsel is located.  
14 Veolia is also an essential business serving  
15 COVID-19 labs.

16 ABC's 2019 permit appeal fails because  
17 EPA provided a strong factual basis for the  
18 permit. The current appeal began with the  
19 strength of Veolia's appeal of the 2017 permit,  
20 which forced settlement negotiations between EPA  
21 and Veolia. In those settlement negotiations,  
22 Veolia agreed to install carbon injection,

1 something that EPA admits that it could not  
2 require of Veolia. Both EPA and ABC agree carbon  
3 injection effectively resolved any mercury  
4 emissions, and mercury is not a part of this  
5 appeal.

6 Without mercury, LVM and SVM alone do  
7 not support the multi-metals CEMS. ABC relies  
8 primarily on the NEIC report for its 2019 permit  
9 appeal. The report is eight years old. At the  
10 time of its issuance, Veolia fully addressed its  
11 findings. No enforcement or other type of  
12 actions were ever taken based on that report.  
13 ABC states NEIC is the most recent data. That's  
14 not true. Since the NEIC report came out, Veolia  
15 has conducted CPTs in 2013 and 2018. Both CPTs  
16 showed overall improvement and large margins of  
17 safety with regard to metals.

18 Veolia has also performed thousands of  
19 tests on waste and revised hundreds, if not  
20 thousands, of waste profiles.

21 JUDGE AVILA: Can I interrupt you real  
22 quick?

1 MR. KELLMEYER: Go ahead.

2 JUDGE AVILA: What's your view on the  
3 standard of review here? Do you take the same  
4 view as the Region expressed earlier today?

5 MR. KELLMEYER: I certainly do. Yeah.  
6 I think if you end up using Fox in this matter  
7 that you're going to end up really quashing  
8 internal Agency discussions and attempts to  
9 settle decisions before the Board. Fox is really  
10 designed to be used by courts after two final  
11 Agency actions appear to conflict, and that's not  
12 the situation here at all. There's never been a  
13 final Agency action here, and in order to  
14 encourage settlements and discussions internally  
15 within the Board, I'm sorry, within EPA, as well  
16 as externally with opposing counsel, you have to  
17 allow a free flow of information.

18 If EPA is constantly worried about  
19 well, if I take a position, I'm going to have to  
20 meet this heightened standard before a final  
21 decision is made, essentially you're causing the  
22 final decision of the Agency to be moved down

1 into the area where you're supposed to have  
2 robust discussion in order to arrive at a  
3 conclusion. So I agree with the EPA's position  
4 with regard to what the appropriate level of  
5 standard of review should be.

6 JUDGE STEIN: But you don't disagree,  
7 do you, Mr. Kellmeyer, that the standard the  
8 Board should apply is the clear error or  
9 considered judgment standard that it has applied  
10 for many, many years in the resolution of permit  
11 appeals?

12 MR. KELLMEYER: I do not disagree with  
13 that. I agree. I agree with that.

14 JUDGE STEIN: And while I have the  
15 floor, I have a question that I asked Region 5,  
16 which relates to the 2018 CPT results. I'm  
17 wondering if you can add any light or anything  
18 additional to what the Region said as to the role  
19 or how the Board should view the 2018 results  
20 that are in the record of this permit, if at all?

21 MR. KELLMEYER: The Board should review  
22 it, and it should review it as informing the 2013

1 results that EPA relied upon. In other words,  
2 they had the 2013 results which show a very large  
3 margin of safety with regard to LVMS and SVMs.  
4 To the extent that the Board thinks to itself,  
5 well, that's one of -- they can look at the 2018  
6 results, even though EPA didn't necessarily rely  
7 on them, but they can be informed and have  
8 confidence that the 2013 results are accurate  
9 with regard to the large margins of safety.

10 You can see it in our response on Page  
11 two, when you look at the drafts, there's huge  
12 margins for safety with regard to LVMS and SVMs.  
13 Once you exclude mercury, which everybody,  
14 including ABC, agrees has been excluded, the  
15 margins for safety are tremendous and they only  
16 get better. The 2013 CPT actually is improved by  
17 the 2018 CPT. So even if EPA did not rely on the  
18 2018 CPT, you can certainly have absolute trust  
19 in the 2013 results because they did even better  
20 in 2018.

21 JUDGE STEIN: Now the Region said they  
22 weren't sure whether or not that data had been

1 accepted by the Region. Are you in a position to  
2 clarify that?

3 MR. KELLMEYER: I'm not, but if you  
4 give me a moment, because Dennis and Dave are on,  
5 and they both would know with certainty whether  
6 it's been accepted by the EPA. Would it be okay  
7 if they mention -- Dave and Dennis?

8 MR. WARCHOL: We don't know if the data  
9 has been accepted, but as required by the Clean  
10 Air Act, we had to submit a notification of  
11 compliance, which we did in January of 2019.  
12 That notification of compliance included all the  
13 results and the operating conditions that we  
14 operated at that we had to immediately program  
15 into our computer systems and start complying  
16 with.

17 So we are complying with the OPL, the  
18 Operating Permit Limits, that were demonstrated  
19 during the 2018 testing today.

20 COURT REPORTER: This is the court  
21 reporter. Can you please identify yourself?

22 MR. WARCHOL: Yes, sir. My name is

1 Dennis Warchol. I'm the Environmental Health &  
2 Safety Manager at Veolia.

3 COURT REPORTER: Thank you.

4 JUDGE AVILA: Thank you.

5 MR. KELLMEYER: So ABC makes much out  
6 of the isolated, and in my mind, minor issues in  
7 the 2006 and 2008 CPTs. I want to point out that  
8 at all times, at that time in 2006 and 2008,  
9 Veolia fully satisfied all of EPA's concerns.  
10 Further, I want to point out ABC cannot simply  
11 ignore the margins for safety found in the 2013  
12 CPT, as verified again in the 2018 CPT. You  
13 know, the FAP that Veolia operates under is more  
14 stringent and protective than the 2008 permit.

15 Veolia has three inducted plasma units  
16 and four mercury analyzers to find metals in  
17 waste. Its incinerators operate with minimum  
18 incineration temperatures, maximum flue gas flow  
19 rates, and this is all in the current permit,  
20 maximum hazardous waste feed rate, maximum  
21 incineration pressures, and the baghouse and bag  
22 leak detection systems ensure metal capture.

1           The new waste profiles, to the extent  
2 they did them for new waste coming in, are  
3 characterized through sampling and analysis.  
4 They are using approved sources of information,  
5 like generator knowledge, FPSs, technical  
6 information and reference docs.

7           JUDGE AVILA: Can I just stop you right  
8 there?

9           MR. KELLMEYER: Sure.

10          JUDGE AVILA: As I understand the 2019  
11 permit, the feed stream analysis procedures state  
12 that a feed stream will be classified as suspect  
13 if its "profile" contains a hazardous waste code.  
14 I didn't see exactly where profile is defined, so  
15 what makes up the profile of a feed stream?

16          MR. KELLMEYER: I can give you general  
17 information, and Dennis and Dave can probably  
18 give you absolute specifics because they deal  
19 with this every day. Essentially, we get a waste  
20 profile in and we're not only, I mean, the law  
21 allows us under RCRA to rely upon the waste  
22 profile that we receive from the generator of the



1 waste. I mean, at the end of the day, who knows  
2 the waste better than the generator, and the law  
3 recognizes that fact and allows us to rely upon  
4 that fact with regards to the waste that we  
5 receive.

6 So that's the waste profile. Once we  
7 receive the waste profile, we still verify the  
8 accuracy of the waste by every two years we  
9 certify and sample and analyze the waste that the  
10 generators give to us. At least every two years,  
11 we not only get the profile and we're legally  
12 allowed to rely on that profile, but we also make  
13 sure that the profile is accurate by every two  
14 years we recertify it and we sample and analyze  
15 it. If you would permit me, I can ask Dave and  
16 Dennis to confirm what I just said.

17 JUDGE AVILA: That's fine if they want  
18 to confirm it.

19 MR. KELLMEYER: Dave and Dennis, can  
20 you speak more on the waste profile?

21 MR. WARCHOL: I think we can confirm  
22 that. The only thing that I think we can add is

1 the generator completes the profile before the  
2 waste ever is accepted to come to the facility.  
3 We don't rely on just the hazardous waste code.  
4 If it's RCRA code D-009, which means it has  
5 mercury in it, obviously it's suspect. But we  
6 also look at the process generating the waste, we  
7 look at where the waste came from, and if we  
8 suspect that there might be metals in the waste,  
9 regardless of the waste code, then it becomes  
10 suspect and then requires the increased analysis.  
11 But we do agree with how you characterized that,  
12 Joe.

13 JUDGE AVILA: And who is speaking  
14 please, for the court reporter?

15 MR. WARCHOL: Yes, this again was  
16 Dennis Warchol.

17 JUDGE AVILA: Thank you.

18 MR. KELLMEYER: And people talk about  
19 the FAP, this is a very conservative FAP, a  
20 ridiculously conservative FAP in that even when a  
21 waste code shows no levels are present, i.e., no  
22 metals are expected and we test it, we find no

1 metals, we still count half the detection limit  
2 as if we found metals. So even for absolutely  
3 clean waste materials, we're taking a hit for  
4 half the detection limit.

5 If a waste code shows that levels are  
6 present, but our analyticals when we sample it  
7 don't show metal, we nevertheless take the full  
8 hit for the detection limit. Again, if the waste  
9 code says there's metals, we sample and analyze  
10 it. If we find no metals, nevertheless, we count  
11 it as if there is metals up to the detection  
12 limit.

13 Historically, if you look at our  
14 historical operation, we've always only had a  
15 fraction of the metals that we're permitted.  
16 Earlier, you had discussed these multi-metal  
17 CEMS, and I have to say something about this  
18 multi-metal CEMS. First, the multi-metal CEMS,  
19 ABC acts as if it answers all the questions. Oh,  
20 why don't we have multi-metal CEMS?

21 First, it's non-Method 29 compliant,  
22 and Method 29 is the method used to determine

1 metal emissions from stationary sources by the  
2 EPA. This multi-metal CEMS doesn't comply with  
3 it. Secondly, you know, there's five metals at  
4 issue at here in the LVM and SVM. One of those  
5 metals, everybody including the folks who produce  
6 the multi-metal CEMS, agree can't be measured by  
7 it, not beryllium.

8           So out of the five metals, you're  
9 talking about four metals. I have no idea what  
10 they, you know, they talk about multi-metal CEMS  
11 as being this golden child. Well, it can only  
12 measure four out of the five metals. It doesn't  
13 take a representative sample. Yeah, they'll  
14 record that it connects to the incinerator, it  
15 clogs with material. Only one manufacturer sells  
16 this product, and they don't sell the umbilical  
17 cord because they know that there's issues with  
18 it.

19           JUDGE AVILA: I'm sorry. You said one  
20 entity produces this thing?

21           MR. KELLMEYER: Only one. It's called  
22 Cooper Environmental Service, and if you look,

1 they're the same folks who claim that they found  
2 something in 2009 in East St. Louis. I'll get to  
3 that in a second.

4 JUDGE AVILA: I think you're almost out  
5 of time, so --

6 MR. KELLMEYER: This one entity sells  
7 this piece of equipment. It's never worked as a  
8 commercial hazardous waste incinerator with the  
9 variety of waste that a commercial hazardous  
10 waste incinerator will see. Finally, with  
11 regards to the piece of equipment that found the  
12 2009 arsenic, it was located about a mile or more  
13 away from the facility in a highly-industrialized  
14 area, next to a burn pile where they were  
15 recovering copper. Where Veolia is located,  
16 there's a lead smelter. Dead Creek Superfund  
17 site located there.

18 If you look at the materials, and  
19 please, I invite you to, it's a marketing  
20 material for the guy who makes the piece of  
21 equipment. It's a hypothetical. He never found  
22 -- he hypothesized that we were the source, but

1 he never proved it and he never even found that.  
2 He even says in the marketing equipment that it's  
3 a hypothetical.

4 JUDGE AVILA: Is that what the Region  
5 relied on in 2017, that --

6 MR. KELLMEYER: That was among the  
7 things the Region relied on, and that's why they  
8 settled the case. That's what I talk about, when  
9 I talk about the strength of the 2017 permit, the  
10 reason we brought the Agency to a settlement is  
11 because we were going to win the 2017 permit  
12 appeal, and they knew it. They got something out  
13 of there that they wouldn't have been able to  
14 get, and that's carbon injection.

15 By their own admission, they knew they  
16 weren't going to get carbon injection. They  
17 couldn't get it. We ended up settling and  
18 agreeing to it. They got something that they in  
19 their wildest dreams would not have been able to  
20 get.

21 JUDGE AVILA: Clerk, has the time  
22 expired?

1 MS. DURR: Yes, it has.

2 JUDGE STEIN: Did you have any closing  
3 remarks, Mr. Kellmeyer, that you wanted to make?

4 JUDGE AVILA: Yeah.

5 MR. KELLMEYER: No, I think I've  
6 covered everything. If you guys don't have any  
7 questions for me. All I do is get excited about  
8 this. I've been living it for about 11 years, so  
9 it's probably best that I shut up.

10 JUDGE STEIN: Let me just assure all of  
11 the parties that the Board very carefully reviews  
12 everything that you've submitted, and that we've  
13 read all the briefs. We've closely examined the  
14 record, and we really do appreciate everybody  
15 being here today. But both we and our very  
16 talented and able staff, even if we haven't asked  
17 a particular question today, you should rest  
18 assured that we have reviewed all of your  
19 submissions.

20 We understand this has been going on  
21 for a while, and we're just happy that we're able  
22 to conduct the argument today so we can move

1 forward to make a decision.

2 JUDGE AVILA: Thank you, Judge Stein.

3 Petitioner's counsel has time for rebuttal, so --

4 MS. HUBERTZ: All right, let me turn my  
5 video on here.

6 MS. DURR: Is that 10 minutes?

7 MS. HUBERTZ: Yes. I wanted to address  
8 some of the things. I'd first like to talk about  
9 the --

10 JUDGE STEIN: One second. I thought  
11 that you had more than 10 minutes.

12 JUDGE AVILA: Yeah, you can use up to  
13 20 minutes if you want it. You don't have to use  
14 it all. I just want to make the time equal with  
15 what we went over with other parties. Don't feel  
16 compelled to use it, but it's available to you.

17 MS. HUBERTZ: Okay, and if you have  
18 questions, I'll be happy to answer them. But I  
19 do want to address the conditions that led to the  
20 2017 and also to the 2019 feed stream analysis  
21 plan. Veolia made the same arguments that it's  
22 making now. Well, we should be able to rely on



1 generators, we do all this testing, and our  
2 profiles are based on our experience. The 2017  
3 permit found that lacking, as did the NEIC  
4 report, because for whatever reason, metals were  
5 getting through and not being detected.

6 Things that shouldn't have had metals  
7 in them should, and did have metals in them,  
8 metals were being under-reported. So whatever  
9 feed stream analysis plan we end up with, it has  
10 to address those issues. I think that Veolia has  
11 claimed many times that it's completely changed  
12 its ways and now it's doing everything exactly  
13 the way it's supposed to. But that's really not  
14 in the record, and that's really not the problem  
15 that it's -- they've made it sound that that  
16 problem no longer exists.

17 So we want to make sure that it's not  
18 going to happen again, and that's the reason for  
19 the feed stream analysis plan. As far as the  
20 NEIC report, kind of a related point, yes, it is  
21 a number of years old. EPA has no trouble  
22 relying on it being that old. I personally would

1 have expected before they changed their mind they  
2 would have checked to see what was going on now,  
3 but they didn't do that, so the NEIC report is  
4 the best statement of Veolia's waste management  
5 practices and feed stream analysis procedures.

6 I also want to talk a little bit again  
7 about the dual nature of the two prongs the EPA  
8 had in 2017. The maximum feed stream rates are  
9 only reliable if the CPTs are reliable.

10 If there's variability or some kind of non-  
11 linear thing, then the CPTs won't be -- then the  
12 maximum feed rate limits won't be accurate. Then  
13 the problem that -- and also at the same time, if  
14 the waste profiles entered into the computer are  
15 not accurate, then the maximum feed rate won't be  
16 accurate, so that Veolia thinks it's feeding one  
17 unit, and it's really feeding 30 units, their  
18 calculations will show they're in compliance with  
19 the maximum feed rate, but they'll be wrong.

20 That's how I understand it, and that's  
21 what I believe EPA was saying in 2017. The fact  
22 that Veolia has, and I don't think EPA relied on

1 this in its written materials, the fact that  
2 Veolia says oh, we only feed a fraction of what  
3 we're allowed to feed, that shows they know  
4 exactly how much they're feeding. Otherwise,  
5 they're relying on a standard that was generated  
6 in perhaps an insufficient way. That's why I  
7 think both provisions need to be in there,  
8 verification of how the incinerators burn and  
9 also of what's actually going into the  
10 incinerator in the first place.

11 JUDGE AVILA: That gets me back to, I  
12 mean, are you basically arguing that every  
13 shipment that goes to this facility needs to be  
14 tested? I'm having a hard time figuring out --  
15 besides that and what's required in the 2018  
16 permit, what does the Conservancy think is  
17 appropriate here?

18 MS. HUBERTZ: Well, I think that there  
19 are some loads that apparently really do need to  
20 be tested every time. That was NEIC's finding.  
21 It's something Veolia says that they're doing.  
22 They're not required to do it by the permit, and

1 I would rather see it be required by the permit.  
2 That's because of the way they've labeled their  
3 profiles. They have a profile called organic  
4 debris that they think contains metals, but it  
5 apparently contains a different amount of metals  
6 every time, so it needs to be tested a lot.

7           When we talk about things like expired  
8 pharmaceuticals and cosmetics, there are  
9 exemptions written into the permit for those. So  
10 there's a list of a lot of the things that are  
11 too dangerous to test. Those aren't the non-  
12 suspect waste. Those are exempt waste, and they  
13 don't have to be tested. There were exemptions  
14 before in 2012. NEIC found that there was  
15 something of an abuse of exemptions, but  
16 whatever.

17           The exemptions are there now, and  
18 we're not saying that they should be testing  
19 expired pharmaceuticals or things that they're  
20 going to harm the worker doing the testing. But  
21 at the same time -- now I forgot where I was  
22 going with this. It's not in my notes, either.

1 Let me come back to it if I remember it. I just  
2 lost my train of thought with where I was going.

3 JUDGE AVILA: I interrupted you, so I  
4 apologize.

5 MS. HUBERTZ: No, that's okay. I want  
6 to address another thing that Mr. Kellmeyer  
7 brought up, that the appeal that Veolia filed in  
8 2017 was what brought EPA to its knees and made  
9 them beg or whatever. The appeal was 100 percent  
10 expected by I think everybody in the case. I  
11 think the appeal brought up all of the same  
12 things that Veolia had been bringing up for the  
13 last 10 years, at least. I don't think that  
14 there was anything new about the appeal that  
15 suddenly caused a change of heart in EPA.

16 EPA might have rushed to get it out in  
17 the last days of the administration. They  
18 apparently felt confident enough to do that, so  
19 I'm not sure that the fact that an appeal was  
20 filed is a change of circumstance that supports  
21 what EPA --

22 JUDGE AVILA: Let me just ask one

1 thing. In the 2017 permitting decision, there's  
2 some inconsistencies even in the Statement of  
3 Basis itself, right? At one point, at Page 40 of  
4 the Statement of Basis, it says entitled feed  
5 rate OPLs included in Veolia's permit, and it  
6 says that EPA has reviewed of Veolia's CPT test  
7 report and Veolia's notice of compliance and  
8 determined that there is sufficient information  
9 to enable EPA to establish OPLs for mercury, SVM  
10 and LVM that satisfy the requirements of the Act  
11 and the HWC MACT.

12 But then on Page 57 of the Statement  
13 of Basis, they say, as further discussed below,  
14 the record for EPA's proposed action on Veolia's  
15 Title V permit renewal application supports the  
16 conclusion that monitoring already performed does  
17 not provide sufficient data for EPA to determine  
18 if the metals feed rate OPLs are stringent  
19 enough.

20 How do we reconcile that seemingly  
21 contradictory statement even in the 2017 permit  
22 decision?

1 MS. HUBERTZ: I honestly took the first  
2 statement, that we can create OPLs, to be a typo  
3 because there are so many other places in the  
4 Statement of Basis and in the overall response to  
5 comments, that EPA says the opposite of that, as  
6 it did on Page 57, as you pointed out, rather  
7 than on Page 40. But honestly, I don't know.  
8 That's just my guess.

9 JUDGE AVILA: Okay, thank you.

10 MS. HUBERTZ: Any further questions?  
11 I'll go back to -- I'll just finish up quickly  
12 here. I did want to make it clear that if there  
13 is some other way of verifying the maximum feed  
14 rates that doesn't involve the multi-metals  
15 monitor, ABC would be happy to have that required  
16 in the permit, too. It's not just that we love  
17 this particular multi-metals monitor. It's just  
18 that we want to make sure that we know what's  
19 being burned and what's coming out the stack. I  
20 don't think that EPA justified that in its 2019  
21 decision. Thank you.

22 JUDGE AVILA: Judge Stein, do you have

1 any other questions?

2 JUDGE STEIN: No, I don't. The  
3 argument has been very illuminating and very  
4 helpful, and I think at this point all of my  
5 questions have been answered.

6 JUDGE AVILA: I want to say thank you  
7 to everyone involved for working with the Board  
8 to make this happen. I know we had a couple of  
9 little hiccups along the way, but for myself, and  
10 I think I'm speaking for Judge Stein, as well,  
11 this was very helpful and we appreciate all of  
12 your submissions and work on this case and  
13 appreciate your participation in this argument,  
14 and all the prep that went into it, both to give  
15 very helpful presentations, as well as from the  
16 technical perspective.

17 So, with that, I appreciate the  
18 argument, and we're adjourned.

19 (Whereupon, the above-entitled matter  
20 went off the record at 12:03 p.m.)  
21  
22



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Place: teleconference

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Court Reporter

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