**BEFORE THE ENVIRONMENTAL APPEALS BOARD**

**U.S. ENVIRONMENTAL PROTECTION AGENCY**

**WASHINGTON, D.C.**

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| In re: ESSROC Cement Corporation | ) | |
| RCRA Permit No. IND 005 081 542 | ) | Appeal No. RCRA 13-03 |

# RESPONSE TO ESSROC CEMENT CORPORATION PETITION FOR REVIEW


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**RESPONSE TO PETITION FOR REVIEW**

The United States Environmental Protection Agency, Region 5 ("Region 5" or "Region"), hereby responds to Appeal No. RCRA 13-03, the Petition for Review ("Petition") filed by ESSROC Cement Corporation ("ESSROC" or "Petitioner") on July 8, 2013, regarding Resource Conservation and Recovery Act ("RCRA") Permit No. IND 005 081 542 ("Final Permit").

Petitioner has filed the Petition with the Environmental Appeals Board ("EAB" or "the Board"), seeking review of certain terms and conditions of the federal RCRA permit issued by the Region to ESSROC on June 5, 2013. For the reasons set forth below, the Region recommends that the EAB deny the Petition for Review.

## I. STATEMENT OF ISSUES

Petitioner argues that (1) the Region did not have the authority to require the 2012 second site-specific risk assessment ("SSRA" or "risk assessment") related to the Final Permit, (2) the Region did not use the appropriate bioaccumulation factor ("BAF") in the 2012 SSRA in that (a) it relied on outdated guidance and (b) new guidance instructed the use of a combined lake and river BAF, (3) the Region should have used site-specific information to determine the fish consumption rate used in the 2012 SSRA, and (4) the Region did not consider relevant information from two documents omitted from the administrative record in setting the annual feed rate limit of mercury in the Final Permit.[1]

In response to Petitioner's first argument, the Region does have the authority to require a second SSRA to determine if compliance with the Clean Air Act (CAA) National Emission

[1] In its comments on the draft permit, Petitioner argued that the methylation rate of mercury used by the Region was inappropriate because the France Park lakes, the focus of the 2012 SSRA, were akin to rivers and streams. Essroc's Comments to Draft Federal Permit, Oct. 22, 2012 (Attach. 3). Although, Petitioner did not raise this argument in its Petition, it does make conclusory references to the Region using the incorrect methylmercury factor. Pet. at 18. In its Petition, Petitioner provided absolutely no support for this argument. Thus, the Region is not responding to the false assertion beyond saying that the ***lakes*** at France Park are lakes, not rivers. *See* Admin. R. Doc. ID 46; Final Permit, Response to Comments on the Draft Permit ("RTC"), at 12 (Attach. 1).

Standards for Hazardous Air Pollution for Hazardous Waste Combustors, 40 C.F.R. Part EEE, is protective of human health or the environment. Petitioner incorrectly states to the Board that under RCRA the Region can only require a second SSRA when there is a change in operations or circumstances at the facility in question. Pet. at 1. In deciding to conduct a second SSRA at the ESSROC facility, the Region determined that a change in EPA air dispersion modeling should better represent mercury deposition. Admin. R. Doc. ID 10a (Attach. 5). The Region also determined that a second SSRA was warranted due to the close proximity of two local lakes to the ESSROC facility, one of the nine factors relevant to deciding whether a SSRA is warranted under RCRA, which the previous 2003 SSRA did not address. *See* 40 C.F.R. § 270.10(l)(1); Admin. R. Doc. ID 10a (Attach. 5).

In response to the second argument[2], the Region used a BAF from the 1997 Mercury Report to Congress ("1997 Mercury Study"), which is also the same source for the data underlying the BAF Petitioner prefers, and included in EPA's 2005 Human Health Risk Assessment Protocol for Hazardous Combustion Facilities guidance ("HHRAP"), which is still up to date and was specifically issued to aid in the development of site-specific risk assessments for hazardous waste combustion sources. *See* Admin. R. Doc. ID 47 (Attach. 9). Furthermore, whereas the BAF the Petitioner prefers combines the BAF for lakes and rivers, the BAF the Region used is specifically relevant to lakes, which was the receptor that was the focus of the 2012 SSRA. See 2012 SSRA at 4-6 (Attach. 4); 1997 Mercury Study at Appendix D-1 (Attach. 8); ESSROC's comments on Draft Permit (Attach. 1).

In response to the third argument, the Region relied on the HHRAP default fish consumption rate derived from the widely used, peer-reviewed study, namely the 1987-1988

[2] For the Board's ease of review, this Response to the Petition rearranges the order of the Petition's arguments and addresses the second argument last.

USDA National Food Consumption Survey. Admin. R. Doc. ID 47d, HHRAP at C-1-4 (Attach. 9), citing to Dept. of Agriculture, Food Consumption and Dietary Levels of Households in the United States, 1987-88 (Report No. 87-H-1)("Food Consumption Survey")(Attach. 10). The "site-specific information" provided by ESSROC was anecdotal at best, did not provide any data revealing the amount of fish consumed at the France Park lakes, and certainly did not meet the standard of a survey or study upon which an acceptable risk assessment should be based. *See* Pet. at 17.

In response to the fourth argument[3], information provided for in the two documents that Petitioner claims the Region inappropriately left out of the record was either: (a) not relevant to the 2012 SSRA in that the information focused on BAFs for rivers not lakes and was critical of target receptor subpopulations not used by EPA or reflected internal deliberations of EPA staff or (b) was included in the administrative record in various other documents and considered by the Region in deciding to issue the Final Permit. Furthermore, and perhaps most significantly, Petitioner is barred from raising this as an issue to the Board in that the omission of the two documents from the record was reasonably ascertainable before Petitioner submitted its comments to the draft permit[4] and therefore should have been raised during the public comment period.

As explained in greater detail below, all of Petitioner's arguments fail to meet the burden of demonstrating that the Region's decision was based on a clearly erroneous finding of fact or conclusion of law, or included an exercise of discretion or an important policy consideration which the Board should, in its discretion, review, as required by 40 C.F.R. § 124.19(a). For these reasons, Region 5 recommends that the Board deny the Petition.

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[3] Of note, the Petitioner, in its brief to the Board, does not provide any analysis or support for why the documents are relevant.

[4] The Region issued the draft ESSROC Cement federal permit on July 12, 2012 (Attach. 2).

## II. NATURE OF CASE AND FACTUAL BACKGROUND

Enacted in 1976, RCRA empowers EPA "to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C." *City of Chicago v. EDF*, 511 U.S. 328, 331 (1994). As part of the comprehensive act, Congress drafted the backbone of a permitting program for all facilities that treat, store, or dispose ("TSD") of hazardous waste and directed EPA to promulgate regulations to implement the program. 42 U.S.C. § 6925. EPA was also directed to establish guidelines to assist states in the development of hazardous waste programs. 42 U.S.C. § 6926. EPA authorizes state RCRA programs when they meet EPA's minimum regulatory requirements, including that a person engaging in TSD activities must obtain a permit for such activities. 40 C.F.R. § 271.13. In states where EPA has not authorized a RCRA program, EPA directly implements its own RCRA program and regulations. At the time of the Final Permit issuance, the State of Indiana was authorized to administer all of the RCRA programs except the Boiler and Industrial Furnace ("BIF") regulations under which the 2013 ESSROC Final Permit was issued. Accordingly, Region 5 was responsible for issuing the RCRA Final Permit to ESSROC.

The issue brought before the Board in this Petition is Region 5's issuance of a federal RCRA permit to ESSROC Cement Corporation's Logansport, Indiana facility ("ESSROC facility"). The new permit altered the acceptable amount of mercury that ESSROC was permitted to release into the environment after a risk assessment demonstrated potential elevated health risks to the local community.

RCRA operates through a combination of nationally applicable standards and permitting procedures established in EPA rules, and a permit program in which permitting authorities apply

those regulations to particular facilities and may include additional terms on a case-by-case basis as necessary to protect public health and the environment. 40 C.F.R. § 270.

EPA issued a rule in 2005 to integrate the national emission standards for hazardous waste combustion units under section 112(b) of the Clean Air Act (CAA) and RCRA section 3004(q). 70 Fed. Reg. 59,402, 59, 504-59,525 (October 12, 2005). The rule provided that facilities complying with relevant CAA standards adopted under the Maximum Achievable Control Technology ("MACT") need not comply with the existing RCRA emission standards. *Id.* codified at 40 C.F.R. § 264.340(b). However, because these CAA standards are technology-based, and because EPA lacked sufficient information to evaluate fully the highly variable and site-specific health risks posed by indirect exposure pathways to these emissions (e.g., ingestion of emissions deposited on food or drinking sources), EPA could not conclude that these CAA standards would meet RCRA's protectiveness standard at every facility. *Id.* at 59, 504-59,505.

Accordingly, to support deferring the 1991 RCRA incinerator standards at 40 C.F.R. § 264(O), the rule provides that during a facility's RCRA permit application or renewal process, the permitting authority should consider on a case-by-case basis whether to conduct a site-specific risk assessment, and, if necessary to protect human health and the environment, include additional terms in the facility's RCRA permit. *Id.* Thus, EPA anticipated that site-specific risk assessments of the health effects from mercury would be necessary in some cases to assess "whether operation of a particular hazardous waste combustor in accordance with the MACT standards w[ould] be protective of human health and the environment. *Id.* The regulations establish several factors for permitting authorities to consider in determining the need for a site-specific risk assessment, including but not limited to proximity to receptors and the presence of bioaccumulative pollutants. 40 C.F.R. § 270.10(l)(1).

The HHRAP is the EPA guidance for conducting site-specific risk assessments for RCRA hazardous waste combustion units. Admin R. Doc. ID 47d, HHRAP, at 1-1 (*United States Environmental Protection Agency, Office of Solid Waste and Emergency Response* (2005), *available at* http://www.epa.gov/osw/hazard/tsd/td/combust/riskvol.htm#volume1)(Attach. 9). EPA relied on this guidance in determining the proper science and modeling to be used when conducting a risk assessment. EPA scientists developed a calculation for ascertaining an acceptable mercury feed rate limit to be included in the permit, incorporating modeling contained in the HHRAP.

On May 9, 2008, ESSROC submitted its initial Part B RCRA permit renewal application to the Region. Admin R. Doc. ID 1. ESSROC submitted a revised Part B permit application on August 29, 2008. Admin R. Doc. ID 5. As part of the 2008 permit renewal application process, ESSROC submitted updates to a 2003 SSRA it conducted as part of the 2003 RCRA permitting process. Admin. R. Doc. ID 15 (Attach. 6). The updates were, in part, attempts to respond to more recent EPA guidance relating to the fate and transport of mercury in the environment, but the effort was not complete. As EPA explained in a letter to ESSROC, dated January 22, 2009, neither of these previous risk assessments included an evaluation of mercury dry vapor deposition. Admin. R. Doc. ID 10a (Attach. 5). EPA explained that this omission would need to be addressed, as dry vapor deposition is a significant pathway in the fate and transport of mercury, which had been detected in ESSROC's stack emissions. *Id.* Furthermore, although the France Park lakes are within 1.5 miles of the ESSROC facility, ESSROC chose not to evaluate the France Park lakes for fish ingestion in the 2003 SSRA. *See* Admin. R. Doc. ID 10a (Attach. 5) and 15 at 15 (Attach. 6).

Pursuant to 40 C.F.R. § 270.10(l)(1), EPA undertook a screening-level human health risk assessment of the ESSROC facility that was issued on July 22, 2012. Admin. R. Doc. ID 38 (Attach. 4). The Region used EPA guidance, including the HHRAP, to conduct this SSRA. *Id.* Among other findings, the 2012 SSRA demonstrated a need for mercury limits that are more stringent than the nationwide baseline based on the MACT CAA standards. *Id.* The recommended reduced mercury limits were incorporated into the draft RCRA Permit that was issued for public comment on July 22, 2012. Admin. R. Doc. ID 41 (Attach. 2). The only comments submitted to the Region regarding the draft permit were made by ESSROC and contained comments on the mercury feed rate limit, the kiln #2 system removal efficiency testing, the direct transfer operations, and other requirements that ESSROC comply with relevant permit limits. Admin. R. Doc. ID 43 (Attach. 3), 44. On June 5, 2013, the Region issued the Final Permit, having considered and responded to all the comments raised. Admin. R. Doc. ID 46 (Attach. 1). Of the comments raised by ESSROC during the public comment period, only objections to the calculation of the mercury feed rate limit have been included in the Petition for Review.

## III. STANDARD OF REVIEW

The proper standards for a petition for review of a federal RCRA permit can be found in 40 C.F.R. § 124.19. The preamble to the regulations in §124.19 states that "this power of review should be only sparingly exercised," that "most permit conditions should be finally determined at the Regional level," and that "review by the Administrator should be confined to cases which are important for the program as a whole, or are especially important in their own right." 45 Fed. Reg. 33,412 (May 19, 1980).

For a RCRA permit to merit review by the EAB under 40 C.F.R. Part 124, a petitioner bears the burden to demonstrate that the permit: 1) is based upon a "clearly erroneous" finding of fact or conclusion of law; or 2) involves an "exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. §124.19(a)(4)(i).

Raising the standard in this case to an even higher level is the fact that a petitioner challenging an issue that is fundamentally technical or scientific in nature bears a particularly heavy burden because the Board generally defers to the permit issuer on questions of technical judgment. *E.g.*, *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (EAB 2006); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005).

Petitioner is required to meet threshold requirements in order to prove that the permit was based on clearly erroneous finding of fact or conclusion of law. Prior to filing a petition for review, the petitioner must raise specific objections to the permit during the public comment period. *In re Sierra Pacific Industries*, PSD Appeal Nos. 13-01, 13-02, 13-03 & 13-04 at 18 (EAB 2013); *In re Presidium Energy, LCC,* UIC Appeal No. 09-01 at 2 (EAB 2009). Moreover, in the petition for review, the petitioner must explain why the permit issuer's response to the aforementioned comments is clearly erroneous or otherwise warrants consideration rather than merely repeat the original objections made during the public comment period. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 509 (EAB 2006); *In re Desert Rock Energy Co., LLC*, 14 E.A.D. 50 (EAB 2008); *In re BP Cherry Point*, 12 E.A.D. 209, 217 (EAB 2005); *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).

The purpose of these preliminary requirements is "related to the efficiency and integrity of the overall administrative permitting scheme." *Presidium Energy,* UIC Appeal No. 09-01 at 2, n.3 (EAB 2009). The requirement that the issues raised in the petition were first raised during the public comment period ensures that the Board does not have to "scour the record to determine whether an issue was properly raised." *Presidium Energy,* UIC Appeal No. 09-01 at 2, n.4 (quoting *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.10 (EAB 1999)). The rule also guarantees "that the permitting authority has the first opportunity to address objections, and . . . give[s] some finality to the permitting process." *Presidium Energy*, UIC Appeal No. 09-01 at 2, n.3.

## IV. ARGUMENT

### A. EPA's Decision to Reevaluate ESSROC's Prior Risk Assessment Was Consistent with the Regulation.

Petitioner fundamentally misconstrues the plain language of 40 C.F.R. § 270.10(l). The regulation is clear that the test for whether an SSRA is necessary is a determination that compliance with the MACT standards alone may not be protective of human health and the environment, not whether an SSRA has ever been conducted for the facility. 40 C.F.R. § 270.10(l). Nothing in the rulemaking record contradicts this. Nor does it narrow the discretion conferred by the regulatory text on the permitting authority to determine that Petitioner's previously conducted risk assessment failed to adequately assess the risk from their combustion unit, and to require Petitioner to remedy that deficiency.

### 1. The regulation expressly contemplates that EPA will evaluate the adequacy of an existing SSRA.

Section 270.10(l) provides that whenever a permitting authority concludes that compliance with the MACT standards alone may not be protective of human health or the environment, the authority "shall require the additional information or assessment(s) necessary to determine whether additional controls are necessary to ensure protection of human health and the environment." 40 C.F.R § 270.10(l). The determination of whether the MACT standards will be adequately protective is to be made based on "factors relevant to the potential risk from a hazardous waste combustion unit, including as appropriate" any of nine specifically enumerated factors. 40 C.F.R § 270.10(l)(1). The regulation then specifies a non-exclusive list of nine factors, including one that provides, "[s]uch other factors as may be appropriate." 40 C.F.R. § 270.10(l)(1)(i)-(ix).

Petitioners have selectively focused on one of these nine factors: the "[a]dequacy of any previously conducted risk assessment, given any subsequent changes in conditions likely to affect risk," *id.* at § 270.10(l)(1)(viii), to claim that EPA may not determine that a previously conducted risk assessment fails to adequately address the risks posed by facility operations. But the regulatory text simply cannot be stretched so far.

This provision simply directs EPA to consider, "as appropriate," any previously conducted risk assessment in determining whether additional permit restrictions might be necessary because compliance with the MACT standards may not be adequately protective. 40 C.F.R. § 270.10(l). In other words, this subparagraph merely recognizes that an existing risk assessment may be relevant in reaching this determination. *See* 70 Fed. Reg. at 59,509 ("EPA has added an additional factor to indicate that a previously conducted risk assessment <u>would be</u>

relevant in evaluating changes in conditions that may lead to increased risk.")(emphasis added). But this in no way restricts EPA's authority to determine that a pre-existing risk assessment was inadequate.

Indeed, it is clear that EPA did not intend a pre-existing risk assessment to be determinative of whether compliance with MACT standards will be protective. The regulation expressly directs EPA to consider the "[a]dequacy" of such a risk assessment in making that determination. 40 C.F.R. § 270.10(l)(1)(viii). Notwithstanding Petitioner's wishes, the regulation does not state: "EPA shall base the evaluation ...on...any previously conducted risk assessment, unless there have been subsequent changes in conditions likely to affect risk." Nor can the actual language of the provision support interpreting the regulation in such a fashion.

Petitioner places heavy reliance on the phrase, "given any subsequent changes in conditions likely to affect risk." Pet. at 9. But that phrase merely directs EPA in considering any pre-existing risk assessment to ensure that it is still valid or, in other words, to ensure that the risk assessment still accurately evaluates the risks in light of any changes in the site conditions, in facility operations, or in the science that supported the original risk assessment. At least some of the deficiencies identified with respect to ESSROC's original 2003 risk assessment relate to subsequent advances in the state of the science. For example, the requirement to estimate dry vapor deposition resulted from an evolution of the science. The final 2005 HHRAP included a protocol for running dry vapor deposition within the dispersion modeling. Admin. R. Doc. ID 47d, HHRAP, Chapter 3 (Attach. 9). Even Petitioner must concede that this can be fairly characterized as "a change in condition likely to affect risk," and thus, even under its own interpretation, would be justifiable.

But in any event, this clause simply cannot be read to preclude EPA from determining, as was the case here, that a previously conducted risk assessment failed to adequately address—or to assess at all—particular risks arising from facility operations: for example, the 2003 SSRA did not take into consideration the potential adverse effects of mercury on fishers of nearby lakes, including the lakes at France Park, which is within 1.5 miles of the ESSROC facility and is the focus of the 2012 SSRA. *See* Admin. R. Doc. ID 10a (Attach. 5) and 15 at 15 (Attach. 6). Nor can this clause be read to force EPA to continue to rely on a risk assessment that the Agency has concluded to be inadequate.

Even if Petitioner's construction of subparagraph (viii) were plausible, other language in the rest of the regulation contradicts their claim that EPA lacked the authority to require an SSRA here. First, subparagraph (1) expressly provides that EPA is only required to base its decision on factors relevant to the potential risk from the unit, "including, as appropriate," any of the nine enumerated factors. 40 C.F.R. § 270.10(l)(1). Reliance on an inaccurate risk assessment can hardly be considered "appropriate," under any circumstance. Second, as Petitioner recognizes, factor (ix), which authorizes EPA to consider any other factors as may be appropriate, is also relevant to determining whether EPA could require Petitioner to revise its original risk assessment. *See*, Pet. at 10. The risks associated with the dry deposition of the mercury detected in its stack emissions are directly "relevant to the potential risk from a hazardous waste combustion unit," which is the basis set out in the regulation for determining whether compliance with the MACT is adequately protective. 40 C.F.R. §270.10(l)(1). The absence of any assessment of these risks is equally relevant to such a determination, and thus would indisputably be an appropriate factor, within the meaning of subparagraph (ix). In sum, the plain language of the entire provision contradicts Petitioner's interpretation.

**2. The final rule preamble expressly contemplated that a subsequent SSRA may be necessary.**

Even a cursory examination of the rulemaking record confirms EPA's interpretation that its regulation was never intended to compel reliance on an inaccurate risk assessment. And a full examination of the preamble to both the proposed and final rules demonstrates that EPA never concluded that requiring a subsequent SSRA was impermissible absent a change in site conditions or facility operations.

While EPA did state that the Agency "generally [did] not expect" that facilities would need to repeat a risk assessment, it is clear that was merely a prediction of what EPA anticipated would occur in most cases. 70 Fed. Reg. at 59,504-59,505. This hardly constitutes a prohibition on requiring a facility to remedy a deficient SSRA. Indeed, at no point does the final rule state that facilities would never need to correct an omission or inaccuracy in a pre-existing risk assessment. *See* 70 Fed. Reg. at 59,504-59,516.

In any event, whatever EPA's predictions may have been, they have no bearing on whether a permitting authority is precluded from obtaining the information necessary to determine whether compliance with the MACT will be adequately protective—including by requiring a facility to amend an inadequate risk assessment, which is the question at hand. And on this point, the final rule preamble was clear that whatever EPA expected to occur in many or even most cases, permitting authorities could reach different conclusions based on the individual circumstances before them. *See*, e.g., 70 Fed. Reg. at 59,505; 59,514 ("The rule does not identify a priori that an SSRA will be required in an individual circumstance, but defers that determination to the permitting process. . . "). Implicit in these statements is the recognition that

circumstances at individual facilities may lead to different conclusions, and that permitting authorities would continue to have the authority to accommodate that.

As laid out in the proposed and final rule preambles, the Agency purposely designed the regulation to be open-ended, to provide permit authorities with sufficient flexibility to make decisions specifically tailored to the individual site conditions and facility operations. EPA expressly declined to establish an exclusive set of national criteria for determining that an SSRA would be necessary, to ensure this would be the case. *See*, 70 Fed. Reg. at 59,514, *citing* 69 Fed. Reg. at 21,328-21,331. The Agency reasoned that "[t]he decision to require an SSRA is inherently site-specific, thus permitting authorities need to have the flexibility to evaluate a range of factors that can vary from facility to facility." *Id.*

In sum, nothing in the regulatory text or the rulemaking record support's Petitioner's strained construction of EPA's regulatory authority.

### B. Petitioner Failed to Demonstrate that the Region's Development of the Annual Mercury Feed Rate Limit in ESSROC's Final Permit was Clearly Erroneous.

Petitioner cites the Board's decision in *In re: Ross Incineration Services*, for the assertion that "a mercury feed rate limitation that is 'over restrictive' or 'the product of a defective methodology' may serve as a proper basis for the Board's review." Pet. at 13. The Board never reached the issue because it decided that Ross had not provided enough evidence, facts, and specifics to support its position that the permit limits are overly restrictive or the product of defective methodology. *In re: Ross Incineration Servs., Inc.*, 5 E.A.D. 813, 1995 WL 302362, 5 (EAB Apr. 21, 1995). Ross had apparently challenged all of the feed limits in its permit even though several of them had been suggested by the permitee itself. *Id.* The EAB found this fact

especially persuasive in rejecting the petition for review. As in *Ross*, the Board in the instant matter should also decline to reach the merits of the Petition because the Petitioner has not provided enough evidence, facts, or specifics to support its position that the mercury feed rate limit is overly restrictive.

**1. Petitioner failed to demonstrate that Region's use of the HHRAP default BAF in developing the mercury feed rate limit was clearly erroneous.**

***a. The BAF in the 1997 Mercury Study Report to Congress and the 2005 Human Health Risk Assessment Protocol was not Superseded by the Draft National BAF in the 2010 Guidance Methylmercury Water Quality Criterion.***

The crux of Petitioner's argument is that the Region relied on "outdated" and "superseded" guidance when the Region used bioaccumulation factors for Trophic Level 4 fish and Trophic Level 3 fish to establish the appropriate methylmercury bioaccumulation factor to calculate the mercury feed rate limit in the Final Permit. Pet. at 14. As an initial matter Petitioner did not make clear whether it is claiming that the 1997 Mercury Study Report to Congress or the HHRAP has been superseded.[5] Petitioner merely asserts that the 2010[6] Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion ("2010 Implementing Guidance"), the guidance it cites to for the use of its lower BAF, superseded the guidance EPA used to establish the BAF in the 2012 Risk Assessment. *Id.* Petitioner's assertion is not true and the only support it offers is the fact that the 2010 Implementing Guidance was issued after the 1997 Mercury Study and the HHRAP. Pet. at 13-14.

[5] The HHRAP recommends using the lake BAFs in the 1997 Mercury Study Report to Congress ("1997 Mercury Study"). Admin. R. Doc. ID 47d (Attach. 9); United States Environmental Protection Agency, Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities, *Appendix B-4-27 and A2-2.12.4. (2005).*

[6] Petitioner references the 2009 Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion, but the EPA guidance is dated 2010. The 2010 Implementing Guidance itself recommends the use of 2010 for citations. 2010 Implementing Guidance at i (Attach. 12). This Response cites to the 2010 version.

The Petitioner makes a mere conclusory assertion that the 2010 Implementing Guidance came out after the HHRAP and 1997 Mercury Study, and therefore "EPA effectively relied on guidance that has been superseded in it calculation of the methylmercury [BAF]." Pet. at 14. Petitioner does not explain how the HHRAP and the 1997 Mercury Study are related to the 2010 Implementing Guidance and the basis for its belief, beyond mere dates, that the 2010 Guidance supersedes the former two documents. Based on the scarcity of the Petitioner's support for this argument alone, the Board should decline to reach the merits of the Petition on this issue. Nevertheless, the Region provides further support for it conclusion that the Petitioner did not meet its burden to demonstrate the Region's use of the HHRAP BAF was clearly erroneous. *See,* directly below and Section III.B.1.b.

The **Draft** National BAF that is contained in Appendix A to the 2001 Water Quality Criterion, has never been finalized and is compilation of waterbodies across the nation that describes the concentration of methylmercury in fish and shellfish tissue that should not be exceeded to protect consumers in the general population. *Water Quality Criterion for the Protection of Human Health: Methylmercury*, EPA-823-R-01-001 (Jan. 2001)("2001 Draft Water Quality Criterion")(Attach. 13).[7]

In addition, the two Guidance documents (and the recommended BAFs) serve different purposes. Thus the mere fact that one was issued later in time does not carry any implication that it was intended to supersede the other or that it reflects more advanced science.[8] The 2010 Implementing Guidance was created to aid states in establishing water quality standards and fish consumption advisories based upon the 2001 Water Quality Criterion. The Draft National BAF

[7] Available at:
http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/methylmercury/upload/2009_01_15_criteria_methylmercury_mercury-criterion.pdf

[8] Notably, the 2010 Implementing Guidance makes no mention of the 2005 HHRAP.

recommended in that document was meant to apply to all types of water bodies. 2010 Draft Criterion Implementing Guidance at ii (Attach. 12). By contrast, the BAF that the Region used based on the recommendations in the HHRAP is specific to evaluating the risks based on the characteristic of lakes, which is the water body relevant to the ESSROC's site.

The 2010 Implementing Guidance itself makes it clear that it is not intended to supersede the HHRAP or any other approach that a risk assessor determines would be appropriate based on the individual circumstances at issue. The 2010 Implementing Guidance states up front that:

> This guidance does not impose legally binding requirements on EPA or the regulated community, and may not apply to a particular situation based on the circumstances. *EPA ... retain[s] the discretion to adopt approaches on a case-by-case basis that differs from those in the guidance where appropriate.*

2010 Implementing Guidance at i (emphasis added)(Attach. 12). As explained below, in the case of the 2012 SSRA, the Region determined that it was more appropriate to use the HHRAP default BAF in conducting a site-specific risk assessment of the potential impact of ESSROC's hazardous waste combustor on the nearby France Park lakes. The HHRAP default BAF was specifically calculated for lakes, whereas the Draft National BAF was developed to apply to a combination of rivers and lakes.

Based on the foregoing analysis, Petitioner failed to demonstrate that the HHRAP and 1997 Mercury Study were superseded by the 2010 Implementing Guidance and that the Region was clearly erroneous in its technical judgment to rely on the BAF recommended in the HHRAP and provided for in the 1997 Mercury Study.

**b. Petitioner failed to demonstrate that it was clearly erroneous for EPA to rely on the HHRAP BAF, which is more representative of the site conditions.**

Petitioner fails to include any explanation for its belief that use of the Draft National BAF than the HHRAP BAF is more appropriate than the HHRAP BAF in estimating the risk, beyond the perfunctory, and inaccurate, statement that the latter is superseded by the former. The Region provided a technical rationale for using the HHRAP BAF instead of the National Draft BAF in its response to Petitioner's comments to the draft permit. Final Permit, Response Summary, June 5, 2013, p. 9; Admin. R. Doc. ID 46 (Attach. 1). However, instead of substantively responding to the Region's explanation in the Petition, Petitioner merely provided a conclusory statement that "EPA's response to ESSROC's comments was inadequate on this point." Pet. at 14. Petitioner bears a heavy burden in refuting the Region's technical explanations for issuance of the Final Permit, and such conclusory allegations cannot meet it. The Board typically defers to the Agency on issues that are fundamentally technical in nature. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 561-562 (EAB 2006)(citing *In re Peabody W. Coal Co.*, 12 E.A.D. at 22, 23 (EAB 2005)).

The BAFs in the HHRAP are more representative of the conditions at ESSROC's facility. The HHRAP BAFs are based on directly-measured BAFs for freely-dissolved methylmercury in several lakes throughout North America. 1997 Mercury Study, Volume III, Appendix D-1 (Attach. 8); HHRAP at A-2 (explaining that HHRAP incorporated the 1997 Mercury Study BAF)(Attach. 9). These same data were incorporated into the Draft National BAF, along with additional lake data (where freely-dissolved methylmercury was estimated from either total water column methylmercury or total water column mercury) and data from the streams and

rivers. *See* 2001 Water Quality Criterion at Appendix A-1, A-4 (Attach. 13). Using these data, EPA prepared the Draft National BAF by combining observed and converted BAFs from both lake and river/stream environments. *Id.* The Draft National BAF, which is in Appendix A of the 2001 Water Quality Criterion, for trophic level 3 ($BAF_3$) and trophic level 4 ($BAF_4$) fish (such as walleye, pike, small mouth bass) are each a geometric mean of all river, stream, and lake BAFs for their category. *Id.* at A-8. The mean Draft National $BAF_4$ is lower than even the lowest of all $BAF_4$ measured for lake environments. *Id. at* Figure A-2. In fact, river/stream $BAF_4$, which account for a wide variety of stream conditions (fast-flowing, slow—moving, etc.), span an extremely wide range (two orders of magnitude). But the same cannot be said for the measured $BAF_4$ data reported for lake environments. The reported lake $BAF_4$ barely overlap the extreme upper range of river environment observations and are much less variable (ranging within less than one order of magnitude). Id. As part of the 2012 SSRA process, Regional environmental scientists visited France Park and inspected most of the area and the lakes. The EPA scientists noted that the specific water bodies of concern for impacts from the ESSROC facility (i.e., Elzbeck Lake and Old Kenith Stone Quarry) are clearly lakes and not moving streams or rivers. Response Summary at 10; Admin. R. Doc. ID 40 (EPA scientist's notes on France Park lake characteristics)(Attach. 15). Thus, the EPA scientists properly determined that the Draft National BAF is not more representative of actual conditions at the ESSROC facility than the lake BAFs used in the HHRAP and the 2012 Risk Assessment.

As stated above, the Region explained this rationale for its use of the HHRAP BAF in response to Petitioner's comments on the draft permit. Final Permit, Response Summary at 9-10; Admin. R. Doc. ID 46 (Attach. 1). However, Petitioner failed to provide in its Petition for Review any explanation of why the Region's response was clearly erroneous.

Based on the foregoing analysis, Petitioner failed to demonstrate that the Region was clearly erroneous in its technical judgment to rely on the BAF recommended in the HHRAP and provided for in the 1997 Mercury Study. Thus, the Board should find that Petitioner did not meet the requirement to prove that the Region's use of the HHRAP BAF in making the 2012 SSRA and establishing the mercury feed rate limit in the Final Permit was clearly erroneous. Thus, Region 5 requests the Board deny review of this issue.

### 2. Petitioner failed to demonstrate that the Region's use of the HHRAP fish consumption rate was clearly erroneous.

Petitioner contends that the Region should not have used the default fish consumption rate from the HHRAP and failed to consider site-specific information to determine the appropriate fish consumption rate in its 2012 Risk Assessment. Pet. at 15. In fact, as explained below, the Region did consider Petitioner's anecdotal statements about the France Park lakes and determined that the information was not sufficiently reliable to support a determination of actual fish consumption rates at the France Park lakes. The information merely suggests that site-specific data might be better to use than the HHRAP default rate. Consistent with the HHRAP, the Region does not disagree that site-specific data would be better. The HHRAP provides for that alternative "[w]here use of site-specific information would **reveal the amount** of fish consumed from waters within the study area ..." HHRAP at C-1-4 (emphasis added)(Attach. 9). However, site-specific information must meet certain standards for the Region to decide that it should outweigh the use of the HHRAP default consumption rate. The HHRAP recommends that any request to change from the default parameters include a site-specific "parameter value" that is supported by data or studies, supported by technical literature or studies, and a comparison of weight-of-evidence studies. HHRAP at 5-87 (Attach. 9).

Petitioner was aware that the Region intended to focus the second SSRA on the France Park Lakes. Admin. R. Doc. ID 10a at 2 (Attach. 5); Admin. R. Doc. ID at 41 (Attach. 2). But Petitioner did not provide actual data on fish consumption rates at the France Park lakes. Furthermore, the EPA toxicologist performing the second SSRA was unable to find fish consumption surveys for the France Park Lakes. Thus, the Region used the default fish consumption rate recommended in the HHRAP when site-specific information revealing the amount of fish consumed is not available.

Petitioner also asserts that the HHRAP default rate represents a "high-end fisher" scenario, or as Petitioner calls it in its comments on the draft permit, "subsistence fisher" scenario. ESSROC Logansport Comments to Draft Part B Permit Risk Assessment ("Comments on Draft Permit") at 6 (Attach. 3); Admin. R. Doc. ID 43. This is inaccurate; the HHRAP default rate does not represent "high-end" or "subsistence" fisher scenarios. In the 2012 SSRA, the Region used the default fish consumption rates in Appendix C, Table C-1-4 of HHRAP, which are derived from the *1987-1988 USDA National Food Consumption Survey* (Attach. 10). HHRAP specifically states that its fisher exposure scenarios are not "subsistence" scenarios and are more comparable to reasonable (versus subsistence) amounts. HHRAP at 4-12 (Attach. 9).

The HHRAP default rate is derived from data that represents the **average** amount of home-caught fish eaten per day by people who fish in a local waterbody and **eat at least some** of the fish they catch.[9] It is intended to be used in the absence of specific local consumption data. HHRAP at C-1-4 (Attach. 9). The HHRAP's fish consumption rate is intended to apply to a range of situations:

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[9] HHRAP derived the fish consumption rate from Exposure Factors Handbook analysis of the USDA survey of people who ate some of the fish they caught. HHRAP took the average (mean) of the quantity of food consumed per person. Exposure Factors Handbook, U.S. EPA (1997), Glossary, "Consumer-only intake rate;" Chapter 13.2; and Table 13-23, 5th Column. (Attach. 11).

> Used as presented, these standardized scenarios should be reproducible across most sites and land use areas. We intend these scenarios to be appropriate for a broad range of situations, rather than to represent actual scenarios. We believe that the recommended exposure scenarios and associated assumptions are reasonable. They represent a scientifically sound approach that is protective of human health and the environment, while recognizing the uncertainties associated with evaluating real world exposures.

HHRAP at 4-1 (Attach. 9).

The HHRAP based the default BAF on the 1987-1988 USDA Food Consumption Survey. The USDA conducted a scientific peer-reviewed study that collected information on household food consumption, including information on fish consumption rates:

> Information on food use was collected by interviewing the person identified as most responsible for food planning and preparation. Interviewers were trained to collect information using aided-recall questionnaire methodology. They recorded the kind (such as ground beef and skim milk), the form (such as fresh, commercially canned, or frozen), the quantity, and the cost, if purchased, of each food or beverage used in the household during the 7 days before the interview.

Food Consumption Survey at 4 (Attach. 10).

Petitioner contends that the following information is site-specific information on fish consumption rates at France Park lakes, but, as explained, none of this information either directly provides an estimate of the amount of fish consumed or would allow EPA to calculate a site-specific estimate: (1) the nearby park has a daily entrance fee for fishing; (2) the lakes are small and are not stocked to maintain the available levels of fish for catch over the study timeframe; (3) one of the two lakes is closed to fishing in the summer months; (4) the lakes are known to freeze over the winter months, thereby requiring ice fishing techniques that are less productive in terms of catch; (5) testimonials that fish from the lakes are unlikely to be used as a primary food

source; (6) testimonials that the lakes are unlikely to be able to support sustained high levels of fishing for food over the study period; (7) the Region had previously accepted lower consumption rates to represent local fishing habits in the 2003 Risk Assessment; and (8) the Region had previously accepted lower fractions of contaminated fish consumed in the 2003 Risk Assessment. Pet. at 17-18.

First and foremost, as mentioned above, none of the factors identified by Petitioner provides actual fish consumption data or studies, much less than data or studies specifically for France Park lakes. In fact, in its comments on the draft permit, Petitioner recommends specific fish consumption rates, but does not link those rates to its proffered anecdotal testimonials and information or any other site-specific rationale. Comments on Draft Permit (Attach. 3); Admin. R. Doc. ID 43. That is because the "site-specific information" provided by Petitioner does not include a site specific value nor provide information on which to base an estimate of the amount of fish consumed from France Park lakes as recommended by the HHRAP. HHRAP at C-1-4 (Attach. 9).

Second, Petitioner did not raise factors 1[10], 2 (reference to the lakes not being stocked to maintain level of fish over study time), 7, and 8[11] in its comments on the draft permit. Since Petitioner failed to, as a threshold requirement, raise these factors during the public comment period, the Board should decline to entertain the merits of this argument as related to these factors.

[10] In any case, it is doubtful that the $2 entrance fee would deter the average fisher from entering the park. [www.francepark.com]

[11] The 2003 SSRA was conducted prior to the issuance of the 2005 HHRAP. The 1998 draft HHRAP referred to subsistence fisher scenarios, but the final 2005 HHRAP states that its daily consumption rates are more comparable to reasonable (versus subsistence) fisher scenario. HHRAP at 4-12 (Attach. 9).

Third, Petitioner's statement that "EPA's response ignores several undisputed facts" is erroneous. Pet. at 17. As explained below, the Region did not "ignore" the local lore or statements about park regulations provided by Petitioner in its comments on the draft permit. In its comments to the draft permit, Petitioner contended that the France Park lakes could not support subsistence fishing due to size of lakes and time and lake condition restrictions on fishing. Comments on Draft Permit at 6 (Attach. 3); Admin. R. Doc. ID 43. In response to comments, the Region explained why it was inappropriate to rely on these factors in making a determination of the appropriate fish consumption rate. *See* Final Permit, Response Summary at 10-11 (Attach. 1). In response to Petitioner's comment in the draft permit that one of the two France Park lakes is closed during the summer, the Region explained that even though Old Kenith Quarry Lake currently closes for fishing in the summer months, Elzbeck Lake is fishable year-round. *Id.* The permit limits are based on Elzbeck Lake and not Old Kenith Quarry Lake because Elzbeck Lake has a slightly higher modeled methymercury concentration than Old Kenith Quarry Lake. In response to Petitioner's comment on the lakes freezing over during the winter, the Region responded that the default fisher scenario takes into account fish caught and frozen for later consumption. *Id.* at 11; Food Consumption Survey at 39, Table 11 (Attach. 10). Therefore, EPA does not believe potential seasonal availability would reduce the fish consumption rates.

Rather than data, Petitioner offers only testimonials that fish from the lakes, or generically, lakes in Indiana, are unlikely to be used as a primary food, or subsistence, source and unlikely to be able to support sustained high levels of fishing for food over the study period. The France Park lakes have been open to fishing for decades and remain open to fishing. Petitioner did not provide actual data on the sustainability of subsistence fishing at the lakes, just

anecdotal statements and vague calculations that did not include data on how many fish are in the France Park lakes and how much fish people are taking from the lakes. Furthermore, Petitioner did not provide the Region with any sustainability data based on the intake rate used by the Region. In the absence of site-specific data, EPA properly relied on using the default fish consumption rate.

Based on the excerpts of these testimonials that Petitioner cited, the testimonials merely make the generic point that it might be better to use site-specific information than the HHRAP default value, but as already explained, the Region is not in possession of site-specific information. Moreover, some of the testimonials are generic to Indiana lakes and not specifically France Park lakes. Comments on Draft Permit at 6 (Attach. 3); Admin. R. Doc. ID 43. However, the testimonials do not offer any data on the amount of fish consumed at France Park lakes that the Region could have used in place of the default value to conduct a SSRA and thus determine the appropriate mercury feed rate limit for the ESSROC facility.

It was the technical judgment of EPA environmental scientists that the anecdotal information provided by Petitioner via quotes from testimonials and tangential facts about lake operations did not rise to the level of site-specific information that could support an estimate of a site-specific value. As previously mentioned, while Petitioner mentions the testimonials in its comments, it never provided the Region with the actual testimonials and, even if it had, they were merely conversation records memorializing the opinions of people who may or may not be experts on France Park lakes. Most significantly, Petitioner did not provide the Region with actual data or a study to support an alternative site-specific amount of fish consumed, much less actual data of fish consumed from the France Park lakes.

The HHRAP recommends the use of the default rate in the absence of site-specific data. HHRAP at C-1-4 (Attach. 9). Since, in the judgment of the Region's environmental scientists who conducted the 2012 SSRA, there was no reliable site-specific information available providing actual data about the amount of fish consumed from France Park lakes, it was reasonable for the Region to use the default value recommended in the HHRAP.

Thus, since Petitioner has failed to show that it was clearly erroneous for the Region, in reliance on the technical determinations of the EPA environmental scientists, to use the HHRAP fish consumption rate, the Board should deny the Petition on this issue.

### C. Petitioner Failed to Establish that the Administrative Record was Incomplete

Petitioner's second challenge to the Final Permit consists of Petitioner's identification of two documents (identified as Exhibits 2 and 3 in the Petition) that are not in the administrative record and Petitioner's assertion that because these two documents are missing from the record, the Board should remand the permitting decision back to the Region to ensure that any permitting decision is based upon a complete record.

Petitioner's argument that *In re Ash Grove Cement Co.* compels remand in this circumstance is inapposite, as EPA in fact did "adequately explore and document its analyses of the permitting criteria," as documented by the administrative record in this case. *In re Ash Grove Cement Co.,* 7 E.A.D. 387, 1997 WL 732000, ** 19-21 (EAB Nov. 14, 1997). The administrative record includes the calculation used by EPA and the reasoning for each value used. Admin. R. Doc. ID 38. EPA selected a benchmark of 0.25 to use in its calculation and the resulting permit limitations stem directly from that calculation. *Id.* The mercury feed rate limit selected by EPA and incorporated into the final permit *does* satisfy the Region's chosen level of protectiveness.

Rather, it is Petitioner who failed to expend any time and effort to provide any support and analysis for why the two documents were relevant to the decision establishing an appropriate mercury feed rate limit, in either its comments on the draft permit or the Petition. Petitioner's reference to *Ash Grove Cement* does not obviate its threshold requirements on appeal. As already discussed, a petitioner must raise specific objections to the permit during the public comment period. *In re Presidium Energy, LCC,* UIC Appeal No. 09-01 at 2 (EAB 2009). Moreover, the Board has stated that petitioner must provide an explanation of the basis of its objection in the petition and that it will not speculate on behalf of the petitioner. *In re Ross* at 819 (citing *In re Broward County*, Florida, NPDES Appeal No. 92-11, at 19, n.31 (June 7, 1993)(explaining that the Board "will not engage in sheer speculation.").

Although EPA provided Petitioner with a draft administrative record prior to the comment period, Petitioner waited until after permit issuance to raise its claim that these two documents should be part of the record. Then, Petitioner failed to provide any reasoned analysis as to why these two documents have any relevance to the Region's decision in this matter or contain any factors that the Region failed to consider in making its decision. The Board should not grant review on this issue, since Petitioner did not raise it during the public comment period and has failed to make any effort to demonstrate that the identified documents include any relevant facts or issues not already in the record.

**1. Petitioner failed to raise the issue of an incomplete administrative record during the public comment period.**

As explained above and provided for in 40 C.F.R. § 124.19(a)(4)(ii), Petitioner must demonstrate … that each issue being raised in the petition was raised during the public comment period to the extent it was reasonably ascertainable by the close of the public comment period.

*In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 509 (EAB 2006). Prior to granting review, the Board makes a determination of whether or not a petitioner properly raised an issue during the comment period. *See In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000); *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 540 (EAB 1999).

The documents that the Region intended to include in the administrative record were reasonably ascertainable to Petitioner during the public comment period, as the Region provided Petitioner a draft administrative record on July 22, 2012. Draft Federal RCRA Permit, Essroc Cement Corporation (Attach. 2); Admin. R. Doc. ID 41. The administrative record did not include the two documents Petitioner now claims are crucial. Petitioner's failure to raise this issue during the public comment period bars it from raising it now before the Board. 40 C.F.R. § 124.13; see 40 C.F.R. § 124.19(a)(4).

**2. The Region's decision to issue the Final Permit was not based on the two documents and therefore did not require inclusion in the administrative record.**

The permitting authority does not have to include every single document tangentially related to the matter if that permitting decision was not based on those documents. *See In re Sierra Pacific Industries* at 54 (EAB 2013) (explaining that the Region did not have to include late comments in the record, since it did not base the decision to issue the permit on the comments). In *In re Sierra Pacific Industries*, the Board found the Region's protocol that all comments on a permit be submitted to a specific address and not the permit writer was reasonable. It explained that it is reasonable to expect that comments "might be overlooked admist the dozens of unrelated electronic mails an individual EPA employee might receive on any given day. *Id.* At 53-54. That is precisely what happened in the case of the first document,

Pet. at Exhibit 2, specifically an email from Dan Carney, Schreiber, Yonley & Associates, to Christopher Lambesis, Environmental Scientist, EPA, "Risk Analysis Assumptions for Mercury," September 9, 2011 ("Carney Email") (Pet. Exhibit 2). Mr. Lambesis received dozens of emails on different matters each day over the five years between the submittal of the permit application and the issuance of the permit. It is unreasonable to expect him to keep track of every email. If the information imparted in the email was so important to the decision process, then Petitioner should have raised it in comments to the draft permit, at which time the Region would have given it consideration.

The second document was an internal EPA memorandum developed to address a different permit, namely the 2003 ESSROC RCRA permit, not the 2013 ESSROC permit at issue in this matter. Pet. Exhibit 3. It is hardly reasonable to expect the Region to reach back ten years to another permitting file for deliberative documents to add to an administrative record for a different permit.

The Region respectfully requests that the Board deny the Petition on this issue.

**3. Petitioner failed to demonstrate exclusion of documents from the administrative record resulted in the Region's failure to consider all relevant information.**

***a. Petitioner failed to provide a justification for why the documents were in any way relevant to decision to issue the Final Permit***

Pursuant to 40 C.F.R. 124.19(a)(4)(ii), the Petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review. It is not enough to state that the permitting authority erred with no supportable and articulated rationale as to how it erred. *In re Sierra Pacific Industries* at 21 (EAB 2013). In *In re Sierra Pacific Industries*, the Board denied review of the petition due to the fact that petitioner's arguments lacked specificity. *Id.* at 55.

The Petitioner makes a conclusory statement that the two documents were not included in the administrative record, and omits any supporting explanation and analysis as to how the documents are relevant to the Region's decision in issuing the final permit and why the omission of the documents resulted in an inadequate record. Petitioner merely states that:

> ESSROC provided information regarding site specific fish consumption to EPA through an email dated September 9, 2011. A copy of the email is attached hereto as Exhibit 2. The email is not identified in the administrative record. Additionally, EPA failed to include a June 27, 2003 internal memorandom from Mario M. Mangino to Jae Lee regarding the 2003 risk assessment. A copy of the memo is attached hereto as Exhibit 3.

Pet. at 12.

Since Petitioner failed to provide an explanation supporting why the omission of the documents was clearly erroneous, as required by 40 C.F.R. 124.19(a)(4)(ii), the Board should find Petitioner's argument an insufficient basis for it to conclude that the Region failed to develop an adequate record as the basis of its decision to issue the final permit and decline the Petition on this issue.

Petitioner's failure to provide any supporting explanation and analysis as to how the documents are relevant places the Region and the Board in the awkward position of having to conduct its analysis on Petitioner's behalf. However, the Region has endeavored to do so, below, in an effort to ensure the Board does not have to scour the record and has a thorough understanding of the matter before it.

***b) The information provided in the Carney Email duplicates information already in the record or is irrelevant.***

As explained above, although the Region did not base its decision to issue the Final Permit on these two documents and Petitioner failed to raise the omission of the documents during the public comment period, the Region did in fact consider information in the Carney

Email in response to comments on the draft permit. Petitioner states that the administrative record omits the Carney Email. Pet. at Exhibit 2. The Carney Email is an informal communication in a continuing discussion through email and telephone calls with the EPA environmental scientist conducting the 2012 SSRA. Information in the Carney Email was included elsewhere in the record and was considered by the Region in responding to Petitioner's comments on the draft permit.

The Carney Email asserts that the percentage of contaminated fish that a fisher would consume at the HHRAP consumption level from the one water body in France Park, versus fishing from a variety of water bodies, is implausible. The email contends that the fish from the lakes are not "expected" to be a primary food source due to the park's entrance fee and lakes not being "currently" stocked. To support this assertion, the email cites to fish consumption habits from France Park lakes provided in Petitioner's May 15, 2009 Revised Mercury Comparative Analysis, which references Petitioner's discussions with park and fishery personnel and, significantly, is part of the administrative record.

The email further mentions a phone conversation Mr. Carney had with a purported Indiana fish biologist,[12] Mr. Stefanavage, who is claimed to have said that "he is aware of no subsistence fishing in Indiana at this time and that "given today's economy it is however, possible that a homeless person living under a bridge might try to rely on fish, but he doesn't think that it would be possible to rely on catching fish day to day." According to the email, Mr. Stefanavage is also quoted to have told Mr. Carney over the telephone about the amount of acreage needed to feed one person[13] and that lake species are short lived and are non-fatty species in which contamination does not accumulate. The email goes on to relay that "[i]n

[12] "Purported" in that Petitioner merely makes a reference to Mr. Stefanavage being an Indiana fish biologist, but failed to provide the Region with support for that statement.
[13] The email does not compare the unidentified amount of acreage to the size of Lake France.

response to questions to Mr. Stefanavage about the plausibility of a 30-40% (versus 100%) consumption rate" from waters **such as** France Park lakes, "he did not think that was unreasonable (although still not realistic) especially given the HHRAP default consumption rate assumptions." Pet. Exhibit 2 at 2-3 (emphasis added).

The email also claims that the France Park lakes do not "necessarily" support year-round fishing in that it is not open to fishing during summer months and ice fishing during the winter months does not produce the same level of catch.

All of the information in the email of any significance was in the administrative record, and appropriately addressed by EPA.

- Petitioner raised the issue of the fraction or percentage of fish consumed in its comments on the draft permit. Comments on draft permit at 7 (Attach. 3); Admin. R. Doc. ID 43. The Region's response to Petitioner's comments on this topic on the draft permit is at pages 10-11 of the Final Permit, Response Summary (Attach. 1).
- Petitioner raised the issue of subsistence fishers in its comments on the draft permit. The Region's response to Petitioner's comment is at pages 10-11 of the Final Permit, Response Summary (Attach. 1) and response to this Petition at IV.B.2, above.
- Petitioner raised the issues of the lake not supporting year-round fishing due to it being closed for fishing and the limited catch resulting from ice fishing in its comments on the draft permit. Comments on Draft Permit at 6 (Attach. 3). The Region's response to Petitioner's comment is at pages 10-11 of the Final Permit, Response Summary, above (Attach. 1).

- Some of the information from the Carney Email was, as confirmed by Petitioner, also in Petitioner's May 15, 2009 Revised Mercury Comparative Analysis, which was part of the administrative record. Admin. R. Doc. ID 15 (Attach. 6).
- Some of the information in the Carney Email was not in ESSROC's comments on the draft permit, or even the Petition. As explained in Section IV.B.2, above, the comments did not mention the park entrance fee, and also did not mention the biologists unsupported speculation that lake species are short lived and are non-fatty, in which contamination does not accumulate. If the latter had been in the comments on the draft permit, the Region would have responded that mercury is in all fish tissue, and is **primarily** bound to muscle. *See* Mercury Update: EPA Fish Advisories, U.S. E.P.A. Office of Water, EPA-823-F-01011, page 2 (June 2001)(Attach. 14).
- As explained in Section IV.B.2, above, the Carney Email does not provide the necessary site-specific information on what the Region could rely to calculate a site-specific value that would support a risk assessment. The Region has no idea how the questions were framed in eliciting the testimonial. Petitioner did not even provide the Region with the underlying phone conversation records. Many of the statements made in the testimonials were anecdotal in nature, thus limiting their significance even further. For example, Mr. Stefanavage was quoted to say the lake does not "necessarily" support year-round fishing. What is the significance of "necessarily?" It is a possibility, but not necessarily? Additionally, the biologist was quoted to say that a 30-40% consumption rate was "plausible," but he did not say that the HHRAP default consumption rates were implausible. There could be many plausible scenarios

in any given situation. Furthermore, Mr. Stefanavage offered no information specific to the lakes at issue. For all of these reasons alone, it would have been inappropriate for the Region to have based its decision on anecdotal and general information that was cited to in the Carney Email.

Moreover, putting aside the questionable quality of the information provided in the Carney Email, the email failed to reveal the amount of fish consumed at the France Park lakes to rise to the level of site-specific fish consumption information. As explained in Section IV.B.2, above, the Region cannot use as a numerical input mere anecdotal information as a fish consumption rate. And thus, the information provided in the Carney Email is, in the end, irrelevant.

Thus, since the documents included information that was in fact part of the administrative record and considered by the Region in making its decision is issuing the final permit or was not raised by Petitioner in its comments to the draft permit, the Board should find that the omission of the Carney Email did not prevent the Region from making a reasoned permit decision based upon an adequate record. The information contained in the email is merely duplicative of what is already in the record, and therefore adding the email to the record would be superfluous to what is already in the record and would add nothing additionally relevant that is not already in the record.

***c) The inclusion of the Mangino Memorandum in the administrative record would be inappropriate because it was not relevant to the decision to issue the Final Permit***

Petitioner states that the administrative record inappropriately omits a memorandum from Mario M. Mangino, Toxicologist, EPA, to Jae Lee, EPA, "Further evaluation of Tier 1A metals emissions at the ESSROC Materials Cement Corp. (Logansport, IN) – Exposure to mercury via the fish ingestion pathway," June 27, 2003 (Mangino Memo). *See* Pet. Exhibit 3. The Board

should find that the inclusion of the Mangino Memo to the administrative record is inappropriate in that it: (1) reflects internal deliberations between Agency staff and (2) is irrelevant to the current permit matter.

**(1) The Mangino Memo reflects internal agency deliberations**

The Mangino Memo reflects internal deliberations between two Agency employees. Mario Mangino, EPA Toxicologist, was providing Jae Lee, EPA permit writer, with his thoughts and opinions about a letter submitted on behalf of the Petitioner related to a 2003 SSRA conducted by ESSROC to aid Mr. Lee in his review of the 2003 SSRA. The Board has found exclusion of internal deliberations from administrative records to be appropriate. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 509 (EAB 2006) ("explaining that [p]reliminary thoughts of Agency personnel are not appropriate items for placement in the record"). In *Dominion*, the Board found the exclusion of internal deliberations was justified to avoid confusing the record. *See Id.* (explaining that "[c]luttering the record with the internal discussions between all the regional staff members working on a permit decision would only serve to provide misleading, confusing, and potentially internally inconsistent information about the permit decision"). In this case that certainly holds true. The inclusion of internal deliberations about a prior risk assessment could certainly create confusion about the current permit decision which involved a different risk assessment that is based on updated science and different waterbodies from the 2003 ESSROC permit SSRA. *See* Pet. Exhibit 3. As such, the Board should find that the exclusion of the Mangino Memo as internal deliberations justified and appropriate.

### (2) The Mangino Memo was unrelated to the 2012 Risk Assessment and 2013 Final Permit

The Mangino Memo was developed as part of the 2003 SSRA conducted for the 2003 ESSROC permit, not as part of the 2012 SSRA relevant to the 2013 permit. The focus of the Mangino Memo was the risk posed by methylmercury in the Wabash River, not the France Park lakes that were the focus of the 2012 Risk Assessment. The memo discussed bioaccumulation factors and methylation rates for river scenarios. With respect to the bioaccumulations rates, as explained in Section IV.B.2, above, bioaccumulation factors for rivers are not relevant to determining the appropriate BAFs for lakes. As for the methylation rates, Petitioner did not raise any challenge with respect to the methylation rates EPA used in its Petition.[14] The memo did mention the fraction of fish consumed from the river in ESSROC's 2003 SSRA and stated that a specific fraction of contaminated fish mentioned by ESSROC is a plausible fish consumption scenario, but it was not relevant to showing that the fish consumption rate in the 2012 risk assessment was implausible. The Petitioner did not provide data or specifically collected scientific information on fraction of fish consumed from other local waterbodies.

Based on the above arguments, the Board should find that the Mangino Memo and Carney Email were neither relevant nor necessary to the Region making a reasoned decision in establishing the mercury annual feed rate in the Final Permit, and thus, should decline to grant Petitioner's request that it remand the matter to the Region for consideration of the two documents.

[14] In any event, Petitioner raised the appropriate methylation rate in its comments on the Draft Permit, and the Region responded accordingly. Admin. R. Doc. ID 46 at 12 (Attach. 1). Thus this cannot demonstrate that exclusion of the memo from the Administrative Record was error.

## V. CONCLUSION

Based on the foregoing, Petitioner fails to meet the threshold procedural burden or it burden on merit of demonstrating that the Region's decision was based on a clearly erroneous finding of fact or conclusion of law, or included an exercise of discretion or an important policy consideration which the Board should, in its discretion, review as required by 40 C.F.R. 124.19. Region 5 therefore respectfully requests that the Board deny the Petition for Review.

Respectfully submitted,

Dated: August 7, 2013


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## STATEMENT OF COMPLIANCE WITH WORK LIMITATION

I hereby certify that this Response to ESSROC Cement Corporation Petition for Review, including all relevant portions, contains less than 14,000 words.

Dated: August 7, 2013

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**ATTACHMENT LIST**

1. ESSROC Cement Corp., Final Permit No. IND 005 081 542.
2. Draft Federal RCRA Permit, ESSROC Cement Corporation, Logansport, Indiana, IND 005 081 542, July 22, 2012.
3. ESSROC's Comments on Draft Permit, to Gary Victorine, U.S. EPA, from Jeremy Black, ESSROC Cement Company, October 22, 2012.
4. 2012 Screening-Level Human Health Risk Assessment, ESSROC Cement, Logansport, IN, RCRA Permit Part B, June 19, 2012.
5. Risk Assessment Update Request, to Corey Conn, ESSROC Cement Co., from Jae Lee, U.S. EPA Region 5, January 22, 2009.
6. May 15, 2009 Revised Mercury Comparative Analysis, to Jae Lee, U.S. EPA Region 5, from Carrie Yonley, Schreiber, Yonley & Associates.
7. 2003 Site-Specific Risk Assessmen, ESSROC Cement Corp., Logansport, Indiana, March 2003.
8. 1997 Mercury Report to Congress, Volume I, III Appendix D.
9. Human Health Risk Assessment Protocol for Hazardous Combustion Facilities, United States Environmental Protection Agency, Office of Solid Waste and Emergency Respo*nse* (2005), Volumes1, 3, 4, and 5, and Appendices A, B, and C.
10. Dept. of Agriculture, Food Consumption and Dietary Levels of Households in the United States, 1987-88 (Report No. 87-H-1).
11. Exposure Factors Handbook, U.S. EPA, August 1997.
12. 2010 Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion.
13. 2001 Water Quality Criterion, Appendix A
14. Mercury Update: Impact on Fish Advisories, Fact Sheet, EPA June 2001
15. Lake Information, Conversation Record, Christopher Lambesis, March 2, 2011.

# CERTIFICATE OF SERVICE

**Appeal No. RCRA 13-03**

**ESSROC Cement Corporation**
**RCRA Permit IND 005 081 542**

I hearby certify that: 1) on this 7th day of August 2013, I caused to be electronically filed the foregoing Response ESSROC Cement Corporation Petition For Review with the Environmental Appeals Board, via Central Data Exchange; 2) on the 6th and 7th day of August 2013, caused to be electronically filed the attachments to the Response to Petition for Review with the Environmental Appeals Board, the adminstrative record index, and the certification of administrative record, via Central Data Exchange and 2) on the 7th day of August 2013 caused to be mailed at true and correct copy to the Petitioner by overnight delivery addressed as follows:

Philip J. Schworer
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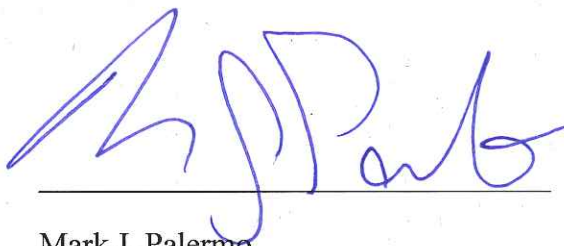

Dated: August 7, 2013

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