

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

In the matter of:

VEOLIA ES TECHNICAL SOLUTIONS,  
LLC

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

Appeal No. CAA 19-01

**AMERICAN BOTTOM CONSERVANCY'S REPLY TO  
EPA REGION 5's AND VEOLIA ES TECHNICAL SOLUTIONS, LLC's RESPONSES  
TO ITS PETITION FOR REVIEW**

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American Bottom Conservancy (ABC) replies as follows to EPA Region 5’s Response to ABC’s Petition for Review, filed December 9, 2019 (“Region 5 Response”), and to Veolia ES Technical Services, LLC’s Response to ABC’s Petition for Review, filed December 16, 2019, as amended by its filing of December 17, 2019 (“Veolia Response”).

## INTRODUCTION

ABC challenges two provisions of the Title V Permit issued on June 17, 2019: (1) the elimination of the temporary multi-metals monitoring provisions found in Condition 2.1(D)(1)(i) of the 2017 Permit; (2) the modification of the enhanced feedstream analysis plan provisions found in Condition 2.1(D)(4)(d)(ii) of the 2017 Permit to include Veolia’s preferred suspect/non-suspect categories. Region 5 issued the 2017 Permit after an extensive investigation of Veolia’s operations, multiple rounds of discussions with Veolia, comparisons with other hazardous waste incinerators, and an on-site examination of Veolia’s use of metals waste profiles and testing of waste.<sup>1</sup>

The 2017 Permit rested on a web of interconnected factual findings regarding mercury, semi-volatile metals (SVM), and low volatile metals (LVM).<sup>2</sup> Region 5 found that

[D]ue to the significant flaws in Veolia's prior feed analysis program, ... it is nearly impossible to determine what is fed into the facility's incinerators on a day-to-day basis, making it practically infeasible to correlate what Veolia burns during the CPT with the day-to-day feedstreams.<sup>3</sup>

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<sup>1</sup> See Response to Comments on EPA’s Proposed Air Pollution Control Title V Permit to Operate at 28, No. V-IL-1716300103-2014-10, at 14-17, 20-21, 126-133, 140-45, dated January 18, 2017. Document ID.EPA-R05-OAR-2014-0280-0273 (“2017 RTC”) (referring to National Enforcement Investigations Center, Multimedia Compliance Investigations Report, dated August 2012. Document ID. EPA-R05-OAR-2014-0280-0264 (“NEIC Report”).

<sup>2</sup> The semi-volatile metals are lead and cadmium, and the low volatile metals are arsenic, beryllium, and chromium.

<sup>3</sup> 2017 RTC at 20-21

[Because of] “the site-specific factors related to the Sauget facility, including the wide variability of the waste stream, EPA believes that there is a great likelihood - which may not necessarily exist at other facilities - that the emissions from this facility could exceed the mercury and heavy metals emissions limits in the HWC NESHAP.”<sup>4</sup>

Region 5 wrote that “EPA believes that the data which can be obtained from the multi-metals monitoring devices is essential to protecting human health and the environment in the Sauget area.”<sup>5</sup>

Less than nine months after its issuance of the 2017 Permit, Region 5 signed the settlement agreement which required Region 5 to reissue the permit to incorporate terms it had previously rejected: removal of the multi-metals monitoring condition and inclusion of activated carbon injection (ACI) mercury controls on Units #2 and #3, along with modification of the enhanced feedstream analysis plan provisions to incorporate Veolia’s preferred suspect/non-suspect categories.<sup>6</sup> In the 2018 Statement of Basis, Region 5 stated that it had reevaluated the evidence and reached the opposite conclusion.<sup>7</sup> This re-evaluation was not based on, a second investigation of Veolia’s testing procedures,<sup>8</sup> the use of new technology to control SVM and LVM, checking the math for errors, or any other gathering of new data that one would expect to undergird such a dramatic about-face. Instead, Region 5’s re-evaluation consists of discounting information that it previously found important and adopting an interpretation of the facts it had previously rejected.

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<sup>4</sup> 2017 RTC at 52.

<sup>5</sup> 2017 RTC at 60.

<sup>6</sup> Signed Veolia EPA Contingent Settlement Agreement, (Oct. 23, 2017). Document ID. EPA-R05-OAR-2014-0280-0277. *See also* Veolia’s Comments on the 2014 Permit, at 10, 23 Dec. 9, 2014) Document ID EPA-R05-OAR-2014-0280-0277(offered to install activated carbon injection controls in 2010 to avoid multi-metals monitoring); ABC Petition at 22 n.84 and documents cited there (Veolia as origin of suspect/non-suspect categories).

<sup>7</sup> 2018 Statement of Basis, at 14; 16-17 (July 13, 2018). Document EPA-R05-OAR-2014-0280-0287.

<sup>8</sup> The 2012 NEIC investigation remains the latest information in the administrative record regarding Veolia’s waste stream testing practices despite Veolia’s insistence that it is outdated. Region 5 did not rely on any more recent information.

## STANDARD OF REVIEW

ABC does not dispute that part 71 permits are reviewed for clearly erroneous findings of facts and conclusions of law and that these are weighed under an abuse of discretion standard.<sup>9</sup> Region 5 and Veolia take issue with ABC's claim that because the 2019 Permit represents a significant change in position from the 2017 Permit, that standard must also include the principles set forth in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) and its progeny – that Region 5 supply “a reasoned explanation for ... disregarding facts and circumstances that underlay ... the prior policy.”<sup>10</sup> *Fox*, they claim, has no place in this permit appeal.

Veolia argues that *Fox* is inapposite because it did not involve a Board appeal of a Title V permitting decision, but rather a federal court review of two administrative orders pursuant to the Administrative Procedure Act.<sup>11</sup> But that contention ignores that the *Fox* holding has been applied to a wide variety of federal administrative decisions.<sup>12</sup> Moreover, it is not surprising that *Fox* would be applied broadly since its holding rests on language from *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1982), one of the Court's leading cases interpreting the abuse of discretion standard, and one on which this Board has itself relied.<sup>13</sup> As the *State Farm* Court put it, when there has been a clear change of agency position, supplying a “reasoned analysis for change beyond which that may be required when an agency does not act

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<sup>9</sup> ABC Petition at 13. Region 5 Response at 11-12; Veolia Response at 13.

<sup>10</sup> *Fox*, 556 U.S. at 515-16 (quoted in *Organized Village of Kake v. U.S.D.A.*, 795 F.3d 956, 966 (9<sup>th</sup> Cir. 2015) (en banc).

<sup>11</sup> Veolia Response at 44-45.

<sup>12</sup> See, e.g., *Western Watersheds Project v. Bernhardt*, 2019 WL 7040923, at \*12-16 (D. Or. Dec. 20, 2019) (renewal of grazing permit formerly denied to felons insufficiently supported despite presidential pardon); *Indigenous Environmental Network v. U.S. Dep't of State*, 377 F. Supp. 3d 561, 583-584 (D. Mont. 2018) (change from disapproval to approval of pipeline route insufficiently justified as policy change).

<sup>13</sup> The Board's most recent citation of *State Farm* for the standard of review appears to be in *In re Jordan Development Co, LLC*, 18 E.A.D. 1, 5 (E.A.B. Aug. 8, 2019). EPA also relies on *State Farm* in its discussion of the standard of review which it contends applies to this proceeding. Region 5 Response at 11.

in the first place” is part of the agency’s duty to “cogently explain why it has exercised its discretion in a given manner.”<sup>14</sup>

Region 5 and Veolia also argue that *Fox* is inapplicable to this appeal as the 2017 Permit was subject to Board review and therefore not a final agency decision.<sup>15</sup> But that does not make decisions describing the contours of abuse of discretion review in federal court off limits in Board proceedings. The Board itself has used federal cases interpreting final agency action to guide its decisions, including its review of permitting decisions, and should require a “reasoned explanation” for Region 5’s about-face here.<sup>16</sup>

## ARGUMENT

### **A. Region 5’s Reasons for Removal of Multi-Metals Monitoring for SVM and LVM are Not Reasonable.**

ABC readily acknowledged that the 2019 Permit required installation of ACI controls on units #2 and #3 and that these controls would reduce mercury emissions.<sup>17</sup> As a result, ABC has not contested the elimination of multi-metals monitoring and the enhanced feedstream modifications as applied to mercury.<sup>18</sup> Operation of ACI does not eliminate SVM and LVM emissions, however, and ABC does challenge the 2019 Permit as it relates to those metals.

Veolia and Region 5 agree that SVM and LVM are not controlled by ACI, but dispute the importance of these categories of metals. They argue that the 2017 Permit conditions (multi-

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<sup>14</sup> *Fox*, 556 U.S. at 514 (quoting *State Farm*, 463 U.S. at 42); *State Farm*, 463 U.S. at 48.

<sup>15</sup> Region 5 Response at 17-18; Veolia Response at 44-46.

<sup>16</sup> See *In Re City of Attleboro, MA Wastewater Treatment Plant*, 14 E.A.D. 398, 413-14 (E.A.B. Sep. 15, 2009) (NPDES permit; using federal case law to determine rational basis for permit condition); *In re Prairie State Generating Co.*, 13 E.A.D. 1, 49-50 & n.53 (Aug. 24, 2006) (PSD permit; using federal case law to determine whether comment period should have been reopened); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 402 n.13, 1997 WL 732000, at \*7 (Nov. 14, 1997) (RCRA permit; using federal case law to determine contours of agency discretion, case cited by Region 5 at 11 of its Response).

<sup>17</sup> ABC Petition at 17 & n.56.

<sup>18</sup> ABC Petition at 17-18.

metals monitoring and an enhanced feedstream analysis plan) grew out of a concern about mercury emissions. SVM and LVM were just part of the mix that bolstered Region 5's mercury emissions concerns.<sup>19</sup> ABC does not believe this to be an accurate reading of the 2017 Permit decision as Region 5 consistently linked mercury with SVM and LVM throughout the proceeding, including in the materials designed to communicate with the public.<sup>20</sup> SVM and LVM were treated as specific compliance problems apart from mercury.

But more to the point, Veolia and Region 5 also argue that as of 2019, Region 5 is primarily concerned with mercury emissions which are now controlled.<sup>21</sup> According to them, once mercury emissions are removed from Region 5's consideration, SVM and LVM emissions alone do not justify multi-metals monitoring or the 2017 enhanced feedstream analysis plan.<sup>22</sup>

**1. *Downgrading of pre-2017 SVM and LVM-related events.***

On April 13, 2009, an ambient metals monitor located near the Sauget facility recorded an arsenic concentration of 2,345 nanograms per cubic meter, which Region 5 described as “a potentially dangerous level.”<sup>23</sup> The monitor was at the location for a “short-term (nominally one-month) deployment” as part of an EPA-funded study when it registered the high concentration. In the 2017 RTC, Region 5 also cited to a publication available on the epa.gov website, writing: “The authors’ analysis of publicly available data determined that Veolia was the probable source

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<sup>19</sup> Region 5 Response at 18-19; Veolia Response at 27 (“consideration of mercury drove Region 5’s focus and permitting”).

<sup>20</sup> See *supra* notes 4 and 5. See also 2017 RTC at 26-28, 52; 2014 Statement of Basis at 52-53, 58 (Oct. 10, 2014) Document ID EPA-R05-OAR-2014-0280-0003 (“2014 SB”); 2014 Fact Sheet at 3 (Oct. 10, 2014) EPA-R05-OAR-2014-0280-002

<sup>21</sup> Region 5 at 19-20; Veolia Response at 16.

<sup>22</sup> 2019 RTC at 30-31.

<sup>23</sup> 2017 RTC at 24. Region 5 cited to Advanced Sampling and Data Analysis for Source Attribution of Ambient Particulate Arsenic and Other Air Toxics Metals in St. Louis, EPA Grant XA987912-01, Final Technical Report (St. Louis Study Final Report), Document ID. EPA-R05-OAR-2014-0280-0257, at 42.



of the arsenic, although Veolia has denied responsibility for the observed arsenic concentrations.”<sup>24</sup> In 2019, Region 5 wrote that the spike was “anomalous (to the extent that it was even attributable to Veolia).”<sup>25</sup>

During the May 2006 CPT, arsenic emissions exceeded the MACT limits.<sup>26</sup> In turn, Region 5 and the Illinois Environmental Protection Agency investigated to determine whether the explanation was correct and determined “after a detailed investigation, that contamination from rust and scale in the sampling ports could not have caused the exceedance.”<sup>27</sup> During the August 2008 CPT test, lead emissions from Unit #3 exceeded what would become the HWC MACT limit on a going-forward basis.<sup>28</sup> It attributed the high lead emissions to an incorrectly installed spare baghouse on Unit 2 while the primary baghouse underwent maintenance.<sup>29</sup> In the 2019 RTC, Region 5 wrote that the causes of these events “had been rectified,” that the same

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<sup>24</sup> 2017 RTC at 24 (citing Cooper, J.A. et al. (2010), Guide for Developing a Multi-Metals, FenceLine Monitoring Plan for Fugitive Emissions Using X-Ray Based Monitors, available at <http://www.epa.gov/ttnemc01/prelim/otm31appH.pdf>). Document ID. EPA-R05-OAR-2014-0280-0269. ABC’s cite at footnote 49 on page 16 of its Petition, should be to this document.

<sup>25</sup> 2019 RTC at 30 n.43. It is fair to say that Veolia has a strong antipathy for the first author of the above publication, his company, and his company’s products, and believes the publication’s conclusion to be completely baseless. *See e.g.*, Veolia Response at 26-27; Veolia 2014 Comments at 34-45; It is not clear whether Region 5 has now adopted Veolia’s views regarding this publication.

<sup>26</sup> The MACT limit was 92 µg/dscm for all LVM while Veolia’s arsenic emissions were 230 µg/dscm of arsenic. 2017 RTC at 17.

<sup>27</sup> 2017 RTC at 17 & n.10.

<sup>28</sup> The 2017 RTC indicated that “SVM emissions exceeded the current HWC NESHAP emission limit due to high lead emissions (237 µg/dscm of lead emissions, as compared with the current limit of 230 µg/dscm for all SVM).” 2017 RTC at 17, see also 15. Upon being accused of lying about this (Veolia Response at 18-19), ABC consulted the underlying documents and saw that the HWC MACT standard as of August 2008 was 240 µg/dscm. Region 5 apparently took the 237 µg/dscm of lead emissions during the August 2008 CPT as evidence that Veolia would not be able to meet the new limit of 230 µg/dscm of SVM emissions, which was finalized on October 28, 2008. ABC believes this clears up any misstatement and apologizes for any confusion.

<sup>29</sup> 2017 RTC at 17.

violations did not occur during subsequent testing, and that “these anomalous single data points were not enough to support a conclusion that multi-metals monitoring devices were necessary.”<sup>30</sup>

According to the parties’ Responses, this is adequate.<sup>31</sup> ABC is willing to believe that Veolia fixed the improperly installed equipment and that it now checks the baghouses and the sampling ports before it undertakes a CPT test.<sup>32</sup> Veolia’s specific errors may never recur. But when events arise during two out of three of the most recently scheduled CPTs tests – the only time when stack emissions are actually measured – it is not reasonable to describe them as “anomalies.”<sup>33</sup> If the stacks were monitored daily or if the ambient air were monitored for arsenic daily, for five years, and only registered one exceedance, then it might be reasonable to claim that the exceedance was anomalous. But that is not what happened here.

The 2018 CPT provides another data point, although not with SVM or LVM.<sup>34</sup> However, ABC notes that mercury is not supposed to be a problem because of the ACI controls. During the 2018 CPT, mercury levels during the second run of the metals testing on Unit #4 were just below the HWC MACT limits, despite the use of ACI on that Unit.<sup>35</sup> The HWC MACT mercury limit is 130 µg /dscm, 7% O<sub>2</sub>, and the Run 2 mercury concentration was described as < 130 µg /dscm

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<sup>30</sup> 2019 RTC at 30. It is worth noting that although Veolia and Region 5 now say that the 2017 Permit was primarily based on mercury data, Veolia has never had mercury emissions exceed or nearly miss (within 1.2%) of the then-applicable MACT limits during a CPT as it did with SVM and LVM.

<sup>31</sup> 2018 SB at 11; 2019 Response to Comments at 30 (Jun 17, 2019). Document ID EPA-R05-OAR-2014-0280-0644. (2019 RTC”)

<sup>32</sup> Both the 2017 and 2019 Permits require the operation of a bag leak detection system. 2019 Permit at Condition 2.1(D)(3) (Jun 17, 2019). Document ID EPA-R05-OAR-2014-0280-0644; 2017 Permit (same).

<sup>33</sup> It drops to 40% if the two make-up CPTs are included. *See* 2019 RTC at 11 and nn.11 & 12.

<sup>34</sup> Region 5 referred to the 2018 CPT in the 2019 RTC but it did not discuss the findings, and stated that it would reopen the 2019 Permit to incorporate new OPLs if Veolia requested. 2019 RTC at 36, 42. Accordingly, ABC did not address it in its Petition, but Veolia discusses the 2018 CPT results in its Response. Veolia Response at 2, 40-43.

<sup>35</sup> See 2018 CPT Report, Table 4-2, “Unit 4 – Results of Metals in Stack Gas,” at 4-32.(Jan. 2019) Document ID EPA-R05-OAR-2014-0280-0643.

7% O<sub>2</sub>.<sup>36</sup> Once again, Veolia attributed the high levels to a malfunction, in this case, “build-up on the end of the nozzle as a result of pre-baghouse gas conditions and carbon injection.”<sup>37</sup> Because Veolia and its consultant were monitoring mercury emissions for the CPT, they were able to pause after Run 2, discover the reason for the high mercury levels, clean the nozzle, and complete Run 3.<sup>38</sup> In daily operations, Veolia would not be able to make the same correction even though it is monitoring other parameters. This was Region 5’s concern in 2017, and it remains ABC’s concern.

Veolia claims that ABC is attempting to mislead the Board about the rigorous nature of CPT testing. But ABC’s argument is about the level of planning that goes into these high stakes tests.<sup>39</sup> A CPT is planned months in advance, the test plan is run past EPA’s regional offices to make sure it is acceptable, the test is performed under carefully calibrated conditions, by a third party contractor, with a QA/QC procedure built in. Because it is will determine operations for the next five years, each CPT is high-stakes, so that there is every incentive to have the system operating as smoothly as possible on the days of testing. In other words, with this much advance knowledge and planning, one would think that all of the baghouses would be checked, all of the sampling ports examined for rust/scale buildup, and the nozzles cleaned. Yet even under these highly controlled circumstances, Veolia still ran into problems during the majority of its scheduled CPTs.

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<sup>36</sup> Less than 130 means that the value was between 129 and 130, not that it was just somewhere between 1 and 130.

<sup>37</sup> Veolia Response to EPA question (October 2019). Document ID EPA-R05-OAR-2014-0280-0655.

<sup>38</sup> *Id.* see also 2018 CPT Report at 19 (Run 2 completed on October 24, Run 3 completed on October 26). Run 3 showed results more in line with what Region 5 and Veolia expected, and low enough that the average of all three runs was about 50% of the MACT limit. 2018 CPT Test, Table 4-2 (Run 3 level, <4.1, 68 micrograms/dscm, 7% O<sub>2</sub>, average of three runs <67 µg /dscm, 7% O<sub>2</sub>.)

<sup>39</sup> The preparation for the 2018 CPT is described at pages 1-1 through 1-2 of the 2018 CPT Report.

Perhaps it was just Veolia's bad luck that its equipment happened to repeatedly malfunction on the three days out of five years that each incinerator's emissions were tested and that nothing similar never happens during the more than 99% of the time it is engaged in daily operations .and its emissions are not monitored directly. That's what Region 5 has concluded and what Veolia and Region 5 argue in their Responses. The temporary use of multi-metals monitoring would have definitively answered that question.

## **2. *SVM and LVM in the 2013 and 2018 CPT Tests.***

In 2017 Region 5 found that it did "not have sufficient data to support a determination that feedrate OPLs, based only on the mix of wastes and combustion conditions occurring during one performance test, necessarily can assure compliance under the variety of mixes of wastes and combustion conditions. ... operating at the current OPLs may not document compliance with the mercury, SVM, and LVM emission limits and undetected violations may occur."<sup>40</sup> Region 5 is confident in 2019 that the CPT can assure compliance with SVM and LVM emissions.<sup>41</sup>

Both Veolia and Region 5 argue that Region 5 even if ABC were correct in its interpretation of the facts in the previous section, it would be irrelevant due to what Region 5 called the "large margins of compliance."<sup>42</sup> As Veolia describes it, during a CPT, Veolia's contractor feeds SVM and LVM into the incinerator at "many times" its normal feedrate and measures the emissions.<sup>43</sup> In 2019, Region 5 found the 2013 CPT showed large margin of compliance because the "SVM and LVM emissions [were] confined within a very narrow band at the low end of the emissions standards," ranging from less than 3.5% to 6.5% for SVM and

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<sup>40</sup> 2017 RTC at 21.

<sup>41</sup> 2019 RTC at 30.

<sup>42</sup> 2018 SB at 11; 2019 Response to Comments, at 30-31 (Jun. 17, 2019). EPA-R05-OAR-2014-0280-0645.

<sup>43</sup> Veolia Response at 2. It does not specify how many times.

2.8 to 11% of the MACT standard for LVM.<sup>44</sup> And, in 2017, Region 5 found that due to the nonlinear relationship<sup>45</sup> between the metals feedrate and emissions “EPA does not believe that a reliable feedrate-emissions relationship can be readily ascertained from the available historical emissions and feedrate data for SVM and LVM from these units.”<sup>46</sup> However, today, although continuing to recognize that the relationship between the metals feedrate and emissions remains nonlinear, and thus difficult to predict, it believes the variation is found only within the same “narrow band.”<sup>47</sup>

The large margin of compliance would be more reassuring were it not for the fact that the 2013 NEIC Report showed that there were also large discrepancies between the concentration of metals Veolia believed it to have been incinerating and the concentration of metals actually in the waste as shown through testing, or consultation of other materials describing the waste. The 2017 RTC used Mercury as an example: “Veolia had reported that Profile AF3753 had a total mercury value of 25 mg/kg, when the profile package listed a total mercury value of 4,140 mg/kg. If the mercury concentration reported in the profile package was present in the waste that was incinerated on August 28 and 29, 2011, Veolia would have violated the feedrate OPLs and emissions for mercury.”<sup>48</sup> While the specific instance cited involved mercury, the same NEIC

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<sup>44</sup> 2019 RTC at 30. Veolia additionally argues in its response that it does not feed SVM and LVM to the full extent that it is allowed to according to the OPLs, thus providing an additional margin of compliance. Veolia Response at 43-44. It includes a table describing “actual feedrates,” but does not provide a citation. At any rate, this argument does not seem to have factored into Region 5’s discussion in the 2018 SB or the 2019 RTC.

<sup>45</sup> A nonlinear system is one in which a change in an input is not proportional to the change in the output. A small input could result in an exponentially higher output or vice versa.

<sup>46</sup> 2017 RTC at 17.

<sup>47</sup> 2019 RTC at 30.

<sup>48</sup> 2017 RTC at 20. This was written after the 2013 CPT while Region 5 looked at the same “large margins of compliance” it on which it now relies.

Report on which EPA relied in 2017 also notes large discrepancies in the concentrations of other metals as well:

Profile CARBN1 is a generic profile broadly used by Veolia that uses a standard concentration value of chromium of 139 mg/kg. One of the load receipts, received on April 8, 2011, and sampled and analyzed on June 9, 2011, had an actual chromium concentration of 99,780 mg/kg.<sup>49</sup>

Profile 236152 contained a material safety data sheet indicating that the chromium content of the waste was between 30,000 mg/kg and 60,000 mg/kg. Veolia's ICS data base indicated that the chromium content of the waste stream was only 228 mg/L.<sup>50</sup>

The NEIC Report described two profiles it believed to be very similar, one CI5789, used a cadmium value of 6,470 mg/kg while the other used a cadmium value of 1 mg/kg.<sup>51</sup>

Are the large discrepancies in SVM and LVM enough to overcome the large margin of compliance? Region 5 says not. In the 2018 SB, Region 5 wrote: "EPA has determined that it is unlikely that SVM or LVM emissions will spike to levels that are high enough to violate the applicable SVM and LVM HWC NESHAP emission limits, respectively."<sup>52</sup> But that is pretty much all of its discussion.

ABC does not believe this is a reasonable explanation, especially in light of the specificity of the 2017 findings. 25 mg/kg of mercury is 0.6% of 4140 yet a miscalculation of that level was enough to cause a violation in the 2017 RTC.<sup>53</sup> Did Region 5 make a math error in 2017 that it has since corrected? Is the calculation unique to mercury or would the same be true of the even larger discrepancies in SVM and LVM? Did Region 5 undertake this kind of

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<sup>49</sup> NEIC Report at 26.

<sup>50</sup> *Id.* at 24. In its Petition, ABC incorrectly reported the ICS units as mg/kg instead of mg/L as they appear in the NEIC Report.

<sup>51</sup> *Id.* at 26.

<sup>52</sup> 2018 SB at 11. This conclusion also rests on the 2019 Permit's enhanced feedstream analysis plan as discussed below.

<sup>53</sup> ABC understands that the calculation is not as simple as comparing the two numbers and that it depends on many other parameters, especially given the nonlinear relationship between metals concentrations and emissions. ABC's point is merely that while the margin of compliance may be large, so are these numbers, and less extreme numbers were sufficient to result in non-compliance for mercury in 2017.

calculation at all? Does it now repudiate the factual findings of the NEIC Report in which these figures were reported and adopt Veolia’s explanations for the discrepancies?<sup>54</sup>

Region 5 and Veolia claim the Board should defer to EPA’s scientific and technical expertise.<sup>55</sup> Even so, “[t]he Region’s rationale for its conclusions, however, must be adequately explained and supported by the record.”<sup>56</sup> In *Dominion Energy*, for example, the Region included a “temperature exceedance frequency of [greater than] 5 days as a measure of compliance as its analyses indicated that this was the maximum frequency that would allow for protection ...”<sup>57</sup> Because it did not provide any greater detail in the record, the Board remanded the provision so that the Region could in essence, show its work.<sup>58</sup> ABC asks for the same here.

**B. Region 5’s Modification of the Enhanced Feedstream Analysis Procedures is Not Reasonable**

In its 2019 RTC, Region 5 stated that the enhanced feedstream analysis procedures in Condition 2.1(D)(4)(d)(ii), coupled with the CPT regime, would resolve the NEIC-identified issues and compel compliance with the MACT, so that there was no need either for the multi-metals monitoring or for the more stringent requirements of the 2017 Permit.<sup>59</sup> The NEIC Report identified several categories of problems which led to the undercounting of metals in the feedstream. One was Veolia’s reliance on inaccurate waste profile information that indicated that a load contained no or very low concentrations of metals.<sup>60</sup> Another was Veolia’s use of overly

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<sup>54</sup> It says not. 2019 RTC at 55. For example, in 2014, Veolia argued that NEIC was wrong in finding that the two cadmium profiles discussed above were similar. Region 5 indicated that in the absence of substantiated factual data it would stand by the facts of the NEIC Report. See 2017 RTC at 129-30.

<sup>55</sup> Region 5 Response at 25 (citing *In re Dominion Energy Brayton Point, LLC* 12 E.A.D.490 (EAB2006)); Veolia Response at 31 (same).

<sup>56</sup> *Dominion Energy*, 12 E.A.D. at 510.

<sup>57</sup> 12 EAD at 589.

<sup>58</sup> *Id.* (“without an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis...”) (internal citations omitted).

<sup>59</sup> 2019 RTC at 55 (NEIC Report) 37 (compliance). .

<sup>60</sup> NEIC Report at 24 (profile information showed 0 mg/L chromium, testing showed 1.8 mg/L)

broad profiles with extreme variability within the category so that testing every shipment was recommended instead of using profile values.<sup>61</sup>

For example, NEIC determined that as of December 2011, there were 881 profiles received that year that did not contain a RCRA code indicating that they contained metals and that were not tested on site.<sup>62</sup> Under the 2019 Permit, these 881 profiles would be treated as “non-suspect waste” under Condition 2.1(D)(4)(d)(ii)(B)(III).<sup>63</sup> Under subsection (aa), Veolia could test the “first preacceptance sample of each feedstream received at the facility per 12-month period.” Because of the extreme variability, the pre-acceptance sample might or might not reveal metals content. If it did not, then it would be treated as not containing metals for at least the next 12 months.<sup>64</sup> At that point, Veolia would test another pre-acceptance sample which again, might or might not contain metals. If all goes well, as ABC acknowledged, eventually the once-per-12-months testing will expose a sample that contains metals and it will go on the suspect list.<sup>65</sup> Or Veolia could move to exempt it from testing under Condition 2.1(D)(4)(d)(ii)(F).<sup>66</sup>

For suspect waste, the testing will, at some point, result in an accurate approximation of the metals concentration, as Veolia is required to make changes to the profile as they are

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<sup>61</sup> NEIC Report at 23 (discussing “organic debris” profile).

<sup>62</sup> NEIC Report at 17.

<sup>63</sup> Veolia argues that it has now placed the profiles that were the subject of the NEIC investigation on its suspect list voluntarily. Veolia Response at 30. The NEIC Report did not purport to be a comprehensive list of all problem profiles, but rather illustrative of the types of problems, and ABC uses them here in a similar fashion. In an ideal world, NEIC would have conducted a second inspection which would be part of the record, but that is not the case.

<sup>64</sup> A minimum metals concentration will be used even for a non-detect metal. Condition 2.1(D)(4)(d)(ii)(E)(II) and 2.1(D)(4)(d)(ii)(B)(III). That may resolve the problem if small concentrations of metals are in the sample, but not if the next batch under that profile contains 99,000 mg/kg Cr.

<sup>65</sup> The multi-metals monitoring was intended to reinforce these procedures as it would have detected metals emissions from what appeared to be non-suspect waste.

<sup>66</sup> For example, expired cosmetics are exempted because they are FDA regulated and do not contain toxic metals. Region 5 also noted Veolia’s overuse of exemptions as a problem. *See* RTC 2017 at 26 (NEIC Report, FAP, and RCRA Waste Analysis Plan document a broad list of exemptions).



discovered.<sup>67</sup> However, there were some metals-containing waste categories that were so broad and so variable within the category that NEIC recommended that loads be tested each time they are received.<sup>68</sup> The 2019 Permit does not provide for that level of testing.<sup>69</sup>

Veolia has indicated that in the past, it has been voluntarily testing some of these profiles every time they are received,<sup>70</sup> and represents in its Response that it is “currently sampling and analyzing every waste stream that is suspect for metals each and every time those waste streams are received at the facility” on a voluntary basis.<sup>71</sup> But surely a permittee’s voluntary actions, which it is free to discontinue at any time, should not be a substitute for permit conditions requiring the same, any more than a permittee’s voluntary compliance with permit terms moots an enforcement action.<sup>72</sup> It also indicates that this level of testing is feasible for Veolia.<sup>73</sup>

Veolia argues that has no incentive to include waste loads in the non-suspect category that contain metals because it charges more for metals-containing waste.<sup>74</sup> There are, however, countervailing incentives, like the cost of testing and the fact that a non-metals containing waste is not subject to metals federate OPLs and can be disposed of more quickly and easily. Moreover, despite this incentive, as of 2012, Veolia did not test every unique shipment for

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<sup>67</sup> See 2019 Permit, Condition 2.1(D)(4)(d)(ii)(B)(V).

<sup>68</sup> NEIC Report at 22, 23.

<sup>69</sup> 2019 Permit Condition 2.1(D)(4)(b)(ii). The Permit states that 2008 FAP is incorporated into the Permit. Feedstream Analysis Plan, EPA-R05-OAR-2014-0280-0143, and that Veolia is required to submit a new FAP that incorporates the 2019 Permit conditions. 2019 Permit Condition 2.1(D)(4)(d)(ii).

<sup>70</sup> 2014 Veolia Comments at 90 (voluntarily “sampling and analyzing [organic debris profile] for metals every time it is received”).

<sup>71</sup> Veolia Response at 36.

<sup>72</sup> *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 189 (2000) (permittee’s voluntary compliance would not moot a citizen enforcement action unless it was “absolutely clear” that the violation “could not reasonably be expected to occur.”).

<sup>73</sup> 2019 RTC at 54 (“EPA recognizes that due to the large quantity of feedstreams Veolia incinerates annually, it would be impractical to “sample and analyze” each feedstream for metal content.”).

<sup>74</sup> Veolia Response at 31.

metals and allowed metals-containing loads to slip through undetected. It balks at such a permit requirement now, regardless of its voluntary activities.

### **CONCLUSION**

For these reasons, ABC requests the Environmental Appeals Board grant its petition for review.

Respectfully submitted,

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## **STATEMENT OF COMPLIANCE WITH PAGE LIMITATION**

Pursuant to the August 12, 2013, Standing Order titled Revised Order Authorizing Electronic Filing Procedures Before The Environmental Appeals Board Not Governed By 40 C.F.R. Part 22, this document, exclusive of the certificate of service, table of contents, and table of authorities, does not exceed 15 pages in length.

## CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board, that on December 31, 2019, the foregoing was filed electronically with the Clerk of the Environmental Appeals Board using the EAB eFiling System, as authorized in the August 12, 2013, Standing Order. The foregoing is also being served by next day Federal Express in hard copy paper form on the following:

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