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

In the Matter of:	)	
	)	
VEOLIA ES TECHNICAL SOLUTIONS, L.L.C.	)	
	)	Appeal No.: CAA 19-01
Permittee	)	
	)	
Air Pollution Control Title V Permit to Operate Permit No. V-IL-1716300103-2014-10	)	
	)	

EPA REGION 5 RESPONSE TO
THE AMERICAN BOTTOM CONSERVANCY
PETITION FOR REVIEW

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I. INTRODUCTION

The United States Environmental Protection Agency ("EPA") Environmental Appeals Board ("EAB" or "Board") should deny review of the challenge brought by the American Bottom Conservancy ("ABC" or "Petitioner") to the Clean Air Act ("CAA" or "Act") Title V permit issued by EPA Region 5 ("the Region" or "Region 5") on June 17, 2019, to Veolia ES Technical Solutions, LLC ("Veolia") ("Applicant") for its facility located at 7 Mobile Avenue in Sauget, Illinois. The Region's Title V permit decision for the Veolia Sauget facility is fully supported by the record, including a detailed Response to Comments document ("RTC"). Petitioner has failed to demonstrate a clearly erroneous finding of fact or conclusion of law warranting review of Region 5's decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. FACILITY DESCRIPTION

Veolia's Sauget facility accepts offsite hazardous and non-hazardous waste for further disposal through incineration. The facility includes two fixed-hearth, dual chamber, multi-type feed incinerators (Incineration Units #2 and #3), each rated at 16 million British thermal units per hour (mmBtu/hr), and one rotary kiln incinerator (Incineration Unit #4), rated at 50 mmBtu/hr. Incineration Units #2 and #3 each use spray dry absorbers with lime slurry injection to control hydrogen chloride (HCl) emissions and baghouses for particulate matter (PM) control, which includes metal Hazardous Air Pollutants (HAPs). In addition, on June 12, 2018 and May 31, 2018, Veolia installed and began operating activated carbon injection ("ACI") systems for control of vapor phase mercury on Units #2 and #3, respectively. Units #2 and #3 are similar in design and function with slight differences in feed types and baghouse configurations. Incineration Unit #4 uses a spray dry absorber for HCl control, an ACI system for mercury

control, and a baghouse for PM control. Each incineration unit has a primary combustion chamber (PCC) and a secondary combustion chamber (SCC). The PCCs and SCCs have natural gas-fired auxiliary burners, which are used during startup, shutdown, malfunctions and provide additional heat input. Containers and bulk shipments of hazardous and solid wastes are received, analyzed and transferred to temporary storage facilities, processed, and incinerated in one of the three incineration units.

B. PROCEDURAL BACKGROUND

EPA issued a Title V permit to Veolia on September 12, 2008 ("2008 Permit") pursuant to 40 C.F.R. Part 71, after the State of Illinois, which has the authority to issue Title V permits in Illinois, did not timely issue the permit. *See* Section 3.1.2 of 2018 Statement of Basis ("SOB") for Draft Renewal Permit, EPA-R05-OAR-2014-0280-0004 ("2018 SOB"). In January 2013, the Region issued a draft Significant Modification to the 2008 Permit. The 2008 Permit expired on October 12, 2013; however, because Veolia timely submitted a renewal application, Veolia was authorized to continue operating under the 2008 Permit until a new permit was issued. *See* 40 C.F.R. §§ 71.5(a)(2) and 71.7(b). The Region issued a draft Title V Permit in September 2014. The Region issued a Title V permit to Veolia on January 18, 2017 (Permit No. V-IL-1716300103-2014-10) ("2017 Permit"). Docket ID EPA-R05-OAR-2014-0280-0644.

Among other requirements, the 2017 Permit required Veolia to implement enhanced feedstream analysis procedures that were intended to provide a comprehensive analysis of the amount of metals that Veolia feeds into each incinerator. The 2017 Permit also required Veolia to install and operate, for a period of at least 12 months, multi-metals monitoring devices on each of the three incineration units at the Veolia facility. These devices were intended to ensure that the permit's operating parameter limits ("OPLs") for metal feedrates were accurately correlated

to actual emissions, such that compliance with the OPLs would have assured compliance with the emission limits established by the Hazardous Waste Combustor National Emission Standard for Hazardous Air Pollutants ("HWC NESHAP"). *See* 40 C.F.R. § 63.1209(g)(2); see also 42 U.S.C. § 7661c(c); 40 C.F.R. § 71.6(c)(1).

However, the 2017 Permit never became final agency action because on February 15, 2017, Veolia filed a petition with the EAB challenging the 2017 Permit. 40 C.F.R. § 71.11(l)(5). Veolia objected to a number of requirements in the 2017 Permit including, but not limited to, some of the feedstream analysis provisions and the requirement related to the multi-metals monitoring devices. On March 15, 2017, the EAB stayed all proceedings until May 15, 2017, including resolution of Veolia's motion to stay the permit in its entirety pending resolution of the matter, to allow Veolia and EPA to negotiate a settlement on the disputed issues. The EAB subsequently extended the stay multiple times, with the final stay ending on March 29, 2018. On November 15, 2017, EPA and Veolia announced that they had reached a contingent settlement agreement that would resolve the February 15, 2017 petition. 82 Fed. Reg 52901 (Nov. 15, 2017). The negotiated preliminary draft permit that was attached to the contingent settlement agreement did not include the requirement to temporarily install the multi-metals monitoring devices but required the installation of ACI systems on Units #2 and #3 to control vapor phase mercury and clarified other permit conditions, including some of the feedstream analysis procedures. EPA accepted comments on the contingent settlement agreement until December 15, 2017. Under the terms of the contingent settlement agreement, EPA agreed to propose a permit with revisions to the permit consistent with that agreement and Veolia agreed it would not challenge a final permit issued with only clerical changes from the proposed permit. *See* 2018 Settlement Agreement, Document ID. EPA-R05-OAR-2014-0280-0277. On March 28, 2018,

EPA and Veolia notified the EAB that, after considering public comment, EPA's General Counsel had decided not to withhold or withdraw consent from the contingent settlement agreement between the parties. Accordingly, EPA and Veolia requested a voluntary remand of the 2017 Permit and to dismiss the February 15, 2017 petition. On April 3, 2018, the EAB issued an Order granting EPA's motion for voluntary remand of the 2017 Permit and dismissed Veolia's petition for review without prejudice. Concurrently, the EAB remanded the permit back to the Region.

The Region issued a draft permit for public comment with an SOB on July 10, 2018 ("2018 Draft Permit"). A public hearing was held on August 21, 2018 and public comment was received. A final permit, Docket ID EPA-R05-OAR-2014-0280-0644, was issued with a Response to Comments ("RTC"), Docket ID EPA-R05-OAR-2014-0280-0645, on June 17, 2019 ("2019 Permit"). The 2018 Draft Permit and the 2019 Permit were virtually identical.

On July 17, 2019, ABC filed with the Board a petition challenging the 2019 Permit. In a July 26, 2019 Order, the Board granted Veolia's motion to intervene in the appeal and set an August 26, 2019 deadline for filing responses to the ABC's petition. Order Granting Intervention, Establishing Briefing Schedule, and Specifying Filing Procedures, at 2-3 (July 26, 2019). The matter was stayed from August 23, 2019 to October 17, 2019, while the parties attempted mediation through the EAB's Alternative Dispute Resolution Program. On October 17, 2019, the matter was returned to the active docket and a new briefing schedule was issued. This schedule was subsequently revised and this response ultimately was required by December 9, 2019. Region 5 and the Office of General Counsel, through the undersigned, represent that Region 5 has coordinated with the appropriate offices within EPA in drafting this response.

III. STANDARD AND SCOPE OF REVIEW

The Board's review of CAA Title V permits is governed by 40 C.F.R. Part 71, which authorizes parties to file petitions for review of EPA permit decisions. 40 C.F.R. § 71.11(l)(1).[1]

In any appeal from a permit decision, the petitioner bears the burden of demonstrating that review is warranted. "[A] petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4)(i); 40 C.F.R. § 71.11(l)(1); *accord In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 382-83 (EAB 2017). Under 40 C.F.R. § 71.11(l)(3), the Board has discretion to grant or deny review of a permit decision. *Archer Daniels*, 17 E.A.D. at 383.

The Board ordinarily denies a petition for review of a permit decision (and thus does not remand it) unless the petitioner demonstrates that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. 40 C.F.R. § 71.11(l)(1); 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g.*, *In re La Bay ExBay Ex Energy Ctr., L.L.C* ., 16 E.A.D. 267, 269 (EAB 2014). To meet this standard, it is not enough for a petitioner to rely on previous statements of its objections during the administrative process leading up to the issuance of the permit, such as comments on a draft permit. A petitioner must demonstrate why the permit issuer's response to those objections (the permit issuer's basis for its decision) is clearly erroneous[2] or otherwise warrants review. *See In re Guam Waterworks Auth.*, 15 E.A.D. 437, 444 (EAB 2011).

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[1] However, the same standards that apply to review of permits under 40 C.F.R. Part 124 apply to review of permits under 40 C.F.R. Part 71. *See e.g.*, *In re Peabody Western Coal Company*, 15 E.A.D. 757, 767 n.11 (EAB 2013).

[2] Under the "clearly erroneous" standard, the Board must accept Region 5's findings of fact unless the Board is definitely and firmly convinced that a mistake has been made. In other words, it is not enough that the Board may

In reviewing an exercise of discretion by the permit issuer, the Board applies an abuse of discretion standard. *See In re City of Palmdale*,15 E.A.D. 700, 704 (EAB 2012). The Board will uphold a permit issuer's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *See In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997) ("[A]cts of discretion must be adequately explained and justified."); *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . ."). A permit issuer must articulate with "reasonable clarity" the reasons supporting its conclusions and the significance of the crucial facts relied on in reaching those conclusions. *Ash Grove*, 7 E.A.D. at 417.

As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments," responded to the comments in a meaningful fashion, and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re W. Bay Expl. Co.*,17 E.A.D. 204, 222 (EAB 2016); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), *pet. for review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, so long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re*

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have weighed the evidence and reached a different conclusion; Region 5's decision will only be reversed if it is implausible in light of all the evidence. *In re General Electric Company*, 17 E.A.D. 434, 445 (EAB 2018) (in evaluating a permit decision for clear error, the Board examines the administrative record to determine whether the permit issuer exercised "considered judgment" in rendering its decision).

Dominion Energy Brayton Point, L.L.C., 12 E.A.D. 490, 510, 561-62, 645-47, 670-74 (EAB 2006); *see also, e.g., In re Russell City Energy Ctr., L.L .C.*, 15 E.A.D. 1, 12, 39-42, 66 (EAB 2010), *pet. for review denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012).

The Board does not find clear error simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter. *In re Evoqua Water Technologies LLC*, RCRA Appeal No. 18-01, Slip Op. at 21-22 (EAB June 13, 2019) ("[Petitioner] fails to address the Region's specific response to [a] comment…much less explain why the Region's response is clearly erroneous or otherwise warrants review.").

The Board's "power of review . . . should only be sparingly exercised and most permit conditions should be finally determined at the Regional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also In re Beeland Grp., L.L.C* ., 14 E.A.D. 189, 195-96 (EAB 2008).

IV. ARGUMENT

Petitioner argues that the permit decision is based on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 71.11(l)(1)(i). Specifically, ABC challenges the following attributes of the 2019 Permit as they relate to semivolatile metals ("SVM") and low-volatility metals ("LVM") (but not to as they relate to mercury):[3]

1. The lack of a requirement to install of multi-metals monitors[4] on Units #2 and #3 for a period of at least 12 months in the 2019 Permit (the 2017 Permit, which never was final

[3] EPA notes that only one section of the Permit is challenged and therefore stayed – Condition 2.1(D)(4)(d)(ii) as it related to MACT metals -the remainder of the permit is not stayed. 40 C.F.R. § 124.16(a)(1). Furthermore, if the Board finds in favor of Petitioner, the entire 2019 Permit should not be vacated – rather the 2019 Permit should be remanded to address any issues raised in the Petition which the Board finds have merit. Petitioner seeks too broad a remedy when it seeks to have the 2019 Permit vacated.

[4] EPA notes that at times in this facility's permitting history these devices have been referred to as CEMS – continuous emission monitoring systems. However, there is a definition of CEMS in Part 63. 40 C.F.R. § 63.2; *see also* 40 C.F.R. Part 60 Appendix B (includes performance standard for vapor phase mercury CEMS). As proposed by the Region these devices did not and were not intended to meet these requirements.

agency action, 40 C.F.R. § 71.11(l)(5), contained this requirement in Condition 2.1(D)(1)(i)); and

2. The adequacy of the feedstream analysis procedures for MACT metals at Condition 2.1(D)(4)(d)(ii) in the 2019 Permit.

Region 5 responded to the ABC concerns regarding both of these issues in the RTC.

The Board should deny the petition. The Petitioner improperly tries to reframe its challenge to focus on revisions to specific monitoring provisions that were contained in a permit that never constituted final agency action (the 2017 Permit). However, the appropriate inquiry for the Board is whether the Region adequately explained why the monitoring contained in the 2019 Permit—*as a whole*—is sufficient to assure compliance with the permit terms and conditions. In this case this determination requires a complex technical and scientific evaluation,[5] and the Board should defer to the Region's judgment that—with the inclusion of ACI systems on Units #2 and #3 and the updates to the feedstream analysis procedures from the 2008 Permit—the monitoring contained in the permit is sufficient to assure compliance with the numerical limits in the HWC NESHAP.

A permitting authority's obligation for establishing monitoring in a title V permit is a three-step process:

- First, under 40 C.F.R. § 71.6(a)(3)(i)(A), EPA must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the Title V permit.
- Second, if the applicable requirement contains no periodic monitoring, EPA must add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 71.6(a)(3)(i)(B).
- Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with the permit terms and conditions, EPA must supplement monitoring to assure such compliance. 40 C.F.R. § 71.6(c)(1).

[5] Deference by the Board may not be appropriate in a case where compliance assurance is more straightforward, such as a mismatch between monitoring and the standard. However, the HWC NESHAP contains a variety of overlapping monitoring requirements that make a determination in this case more technical in nature.

See In re Citgo Refining and Chemicals Company L.P., Order on Petition No. VI-2007-01 at 6-7 (May 28, 2009) ("*Citgo*"). As the Administrator noted in *Citgo*, "in many cases, monitoring from applicable requirements will be sufficient to assure compliance with permit terms and conditions." *Id.* at 7. For instance, "monitoring established consistent with EPA's Compliance Assurance Monitoring (CAM rule) . . . will be sufficient to assure compliance with permit terms and conditions." *Id.* Some factors that can be considered include the variability of emissions, the likelihood of a violation, the presence of add-on controls, what the source is already doing, and the type and frequency of monitoring at similar emission units at other facilities. *Id.* at 7-8.

The Petitioner does not dispute that EPA properly added the monitoring required by the underlying applicable requirement, in this case the HWC NESHAP. Instead, the Petitioner's assertion is that the monitoring contained in the HWC NESHAP is insufficient and must be supplemented. More particularly, the Petitioner is claiming that by not including the *particular* monitoring it desires, the permit is deficient.

This argument cannot stand. The Region evaluated the monitoring contained in the permit, which included, but was not limited to, significant updates to the feedstream analysis procedures from the 2008 Permit, and the addition of controls for Units #2 and #3,[6] and determined that the monitoring regime, as a whole,[7] was sufficient to assure compliance.

[6] The Petitioner tries to sidestep the importance of the addition of the ACI systems by claiming only to be challenging the permit with respect to low volatility metals (LVM) and semivolatile metals (SVM). However, this completely ignores the fact that the justification the Region provided for its decision in the 2017 Title V permit (which never went final) did not distinguish between the justification for mercury, LVM and SVM monitoring. *See* 2017 RTC at 12-37, Docket ID EPA-R05-OAR-2014-0280-0274. Instead, in the 2017 Permit the Region took a holistic view of monitoring for these HAPs together to provide the justification for the need for multi-metals monitors. As the Region explained clearly in the RTC for the 2019 permit, 2019 RTC at 30-31, and described more below, with the addition of mercury controls, the Region reevaluated compliance with the SVM and LVM limits and determined that existing monitoring was sufficient and multi-metals monitors were not justified.

[7] It is important to note that the monitoring should be considered holistically without isolating any particular monitoring provision when making this determination. The Petitioner completely ignores all of the other monitoring requirements under the HWC NESHAP. For instance, the Permittee must operate continuous monitoring systems

Contrary to the Petitioner's suggestion, the burden on the Region is not to fully explain changes from a permit that never constituted final agency action, but rather to explain why the monitoring met the standards of 42 U.S.C. § 7661c(c).

A. THE REGION 5 2019 PERMIT DECISION NOT TO REQUIRE MULTI-METALS MONITORS AND TO INCLUDE CHANGES IN CONTROLS AT UNITS #2 AND 3 IS APPROPRIATE

As Petitioner notes, its November 5, 2018 comment raised the issue whether or not multi-metals monitors for a period of at least 12 months should be in the 2019 Permit. *See* Comment 323. Region 5 considered this comment, concluded that multi-metals monitors for a period of at least 12 months need *not* be in the 2019 Permit, and explained the basis for this decision in the RTC at Section II.B. Petitioner has not demonstrated why Region 5's response to this objection in the RTC is clearly erroneous or otherwise warrants review. *See In re Guam Waterworks Auth.*, 15 E.A.D. 437, 444 (EAB 2011).

1. THE REGION PROPERLY RECONSIDERED FACTUAL INFORMATION SUPPORTING THE TITLE V PERMIT

Petitioner first implies that Region 5's response to the Petitioner's concern that the 2018 Draft Permit did not contain multi-metals monitors in order to address SVM and LVM emissions[8] is "clearly erroneous" because Region 5 reached a different conclusion when looking at the same facts when the Region made its 2017 Permit decision. Petition at 15-18. Petitioner faults Region 5 for reevaluating the same facts and reaching a different conclusion:

> EPA's reconsiderations and reevaluations amount to "We changed our mind." Of course a federal agency is allowed to change its mind, especially when there has been a change in administration. But administrative law still constrains the decisionmaker. In [*FCC v.*

that continuously monitor combustion parameters (e.g., temperature, pressure, gas flow), opacity, carbon monoxide and oxygen. RTC at 37 and 39-42. The Permittee must also implement an automatic waste feed cut-off system that immediately and automatically cuts off the hazardous waste feed when specific conditions occur, such as when an operating parameter limit or any emission standard monitored by a CEMS is exceeded.

[8] The 2018 Draft Permit and the 2019 Permit are identical with regard to this issue.

> *Fox Television Stations, Inc.,* 556 U.S. 502 (2009)], the Court held that when a federal agency changes its mind about a policy, it must, among other things give "good reasons" for the new policy. When the "new policy rests upon factual findings that contradict those which underlay its prior policy," the new decision must be supported by "a reasoned explanation ... for disregarding facts and circumstances that underlay … the prior policy" and a "more detailed justification than what would suffice for a new policy created on a blank slate." [*Organized Village of Kake v. U.S.D.A.*, 795 F.3d 956 (9th Cir. 2015)] provides an extensive discussion of the kind of "good reasons" that justify a dramatic about-face. In 2001, the USDA found, based on extensive factual findings, that the "'the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast Alaska] communities' from application of the Roadless Rule." In 2003, following a change in administration, and in reliance on the same record, the agency found that "'the social and economic hardships … outweigh the potential long-term ecological benefits" The Ninth Circuit held: "The 2003 ROD does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a 'minor' one[,]" even allowing for a change in the way the agency valued socioeconomic hardship.
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> Petition at 31-32 (footnotes omitted).

Assuming that this caselaw would apply to the EAB's review of a Region changing course in this permitting action, the United States Supreme Court established a four-part test in *Fox* to determine whether a policy change complies with the Administrative Procedures Act: (1) the agency displays "awareness that it is changing position;" (2) the agency shows that "the new policy is permissible under the statute;" (3) the agency "believes" the new policy is better; and (4) the agency provides "good reasons" for the new policy.[9] *Fox*, 556 U.S. at 515-16; *See also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) (emphasizing that the agency pursuing a change cannot leave "unexplained inconsistency" or neglect to address past relevant underlying facts); *Kake*, 795 F.3d at 966. The new policy must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior

[9] "[An agency changing policy] need not demonstrate to a court's satisfaction that the reasons for a new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicated." *Id.* at 515.

policy," if the new policy rests upon factual findings that contradict those underlying its prior policy. *Id*. The Ninth Circuit examined in *Kake* whether the United States Department of Agriculture ("USDA") properly reversed course after having declined to exempt the Tongass National Forest in Alaska from the "Roadless Rule" in a 2001 Record of Decision (ROD). *Kake*, 795 F.3d at 967. In 2003, "[on] precisely the same record," USDA concluded that the "social and economic hardship to Southeast Alaska outweigh[ed] the potential long-term ecological benefits of the Roadless Rule" *Id*. (citing 68 Fed. Reg. 75,136, 75,141 (Dec. 30, 2003) (internal citations omitted)). The Ninth Circuit determined that the USDA had satisfied the first three elements of *Fox*: (1) USDA was aware it was changing course; (2) USDA determined that the new policy was permissible under the statutes; and (3) USDA believed the new policy was better. *Kake*, 795 F.3d at 967. USDA failed on the fourth element, however, when it provided no "good reason" for adopting the new policy. *Id*. Here, as in *Kake*, the central issue involves whether the later decision rests on factual findings that contradict those in the earlier decision. And if the factual findings in the later decision contradict the earlier decision, a reviewing authority must analyze whether the later decision contains a "reasoned explanation." *Id*. at 967. In this case, the Region explained in the SOB and RTC why the multi-metals monitors were not included in the 2019 Title V permit. Essentially, the Region added the agreed-upon mercury control requirements for units #2 and #3 and the Region explained its new position regarding the comprehensive performance test ("CPT") issues which were identified in the 2017 Permit SOB and RTC. In other words, a reasoned explanation was provided by the Region.

As an initial matter it must be noted that the 2017 Permit was not a final agency action, since it was remanded by the EAB. In other words, the Petitioner relies on caselaw that is inapposite and does not apply to this situation. All of the caselaw cited by the Petitioner relates to

a reversal of decision in a *final* agency action. As noted above, the 2017 Permit never became final agency action by EPA because it was appealed to this Board. *See* 40 C.F.R. 71.11(l)(5). The Board never reached a conclusion as to whether to uphold or reverse the Region's decision-making in the 2017 Permit because it remanded it to the Region. While the Region has reevaluated the facts and come to a different conclusion than in 2017, the *Agency* has not reversed its course or reasoning in any *final* agency action.

Second, even if the caselaw and constraints of administrative law the Petitioner suggests do apply, the changes made due to a reevaluation of the facts in the Title V permitting record regarding this facility support a change in course by the Region. The Region has fully justified why, based on the new facts before it, it believes that the permit is sufficient to assure compliance with the HWC NESHAP:

> In summary, EPA's past concerns centered on a lack of confidence that compliance with the OPLs would assure compliance with the HWC NESHAP limits, particularly due to the significant variability in mercury emissions from Units #2 and #3. Given the installation of ACI on these units and the expected reduction in mercury emissions (along with enhanced feedstream analysis and other monitoring provisions), we are now confident that compliance with the OPLs set during performance tests will be sufficient to assure compliance with the HWC NESHAP standard for mercury (and, as discussed further below, for other pollutants), as envisioned by the HWC NESHAP. See 40 C.F.R. §§ 63.1207(b)(1), (d)(1), 63.1209(l), (n); see also CAA § 504(c); 40 C.F.R. § 70.6(a)(3)(i)(A), 70.6(c). The temporary installation of multi-metals monitoring devices is, therefore, no longer necessary as an alternate approach to establish the OPLs in order to assure compliance with the HWC NESHAP standards for mercury.

RTC at Comment 10 at pp. 27-29; *see also* RTC at Comment 11 at pp. 29-31; RTC at Comment 12 at pp. 31-36; RTC at Comment 16 at pp. 39-42.

Third, even if the 2017 Permit was a final agency action, the 2019 Permit does not have the identical administrative record as compared to the 2017 Permit. The administrative record for the 2019 Permit also discusses the additional 2019 Permit requirement to install ACI systems on Incineration Units #2 and #3:

> EPA disagrees with commenters' suggestions that there have not been any new data or changes in environmental conditions since EPA determined that the multi-metals monitoring devices were necessary, or that the changes to Veolia's permit were done without regard to the health of the community. On the contrary, EPA's decision to not require these devices was based on Veolia's installation and operation of ACI systems, which will reduce Veolia's mercury emissions significantly. Instead of merely monitoring the mercury emissions from Veolia, EPA is now requiring Veolia to better control those emissions to such an extent that additional monitoring is no longer necessary to assure compliance with the numerical limits in the HWC NESHAP. EPA expects this will result in better air quality and reduced pollution exposure for all nearby residents.
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> In addition, as explained in RTC 11, above, EPA determined that the data relating to LVM or SVM emissions involved anomalous results from a single performance test involving lead emissions and another performance test involving arsenic emissions, and concluded that these anomalous single data points were not enough to support a conclusion that multi-metals monitoring devices were necessary for LVM and SVM. EPA believes the causes of these anomalous results have been rectified as illustrated by the large margin of compliance that Veolia demonstrated in its 2013 CPT.

RTC at p. 45

Fourth, even if one ignores the fact that mercury controls for units #2 and #3 are required in the 2019 Permit, in the RTC EPA explains in detail multi-metals monitors for a period of at least 12 months do not need to be in the Title V permit for the facility in order to address SVM and LVM emissions:

> The installation of the ACI systems on Units #2 and #3 is not the only basis for the EPA's determination that multi-metals monitoring devices are no longer necessary to assure compliance with the LVM and SVM limits in the permit. Rather, as explained in the 2018 SOB (pp. 8–12) and in RTC 10, above, after reevaluating the technical bases which EPA previously used to support the need for multi-metals monitoring devices, EPA realized this data related primarily to mercury, and not to LVM or SVM emissions. EPA explained that the data relating to LVM or SVM emissions involved anomalous results from a single performance test involving lead (an SVM) and another performance test involving arsenic (an LVM), and EPA concluded that these anomalous single data points were not enough to support a conclusion that multi-metals monitoring devices were necessary. See 2018 SOB at 10-11.[43] As explained in the 2018 SOB, the causes of these anomalous results appear to be rectified, and Veolia demonstrated a large margin of compliance in its 2013 performance test. See 2018 SOB at 11 (describing large margins of compliance from the 2013 CPT, ranging from 99.5 to 93.5 percent for SVM, and from 97.2 to 89 percent for LVM). Additionally, as we observed in the 2018 SOB, the 2013 CPT showed that the facility's SVM and LVM emissions are confined within a very narrow band at the low end of the emission standards (average measured emissions

during the 2013 CPT ranged from 0.41 to 6.5 percent of the 230 µg/dscm standard for SVM, and from 2.8 to 11 percent of the 92 µg/dscm standard for LVM). Thus, we expect any variability would be confined approximately to the bottom 6.5 percent of the SVM standard, and the bottom 11 percent of the LVM standard, which suggests that any variability would likely be inconsequential with respect to compliance with the relevant standards.

[43] The commenter discusses the ambient arsenic spike, which was previously observed in East St. Louis and that *may* have originated at Veolia's facility. However, as the commenter suggests, this spike appears to be anomalous (to the extent it was even attributable to Veolia), and EPA has no evidence at this time suggesting that such an event might recur.

RTC at 30-31.

Under *Fox*, an agency must provide a detailed justification for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy." 556 U.S. at 515. Even if the Region's 2019 Permit action may be said to rest on factual findings that contradict the views it expressed in the 2017 Permit, the Region has clearly met the *Fox* test in this instance.

2. THE SOB AND RTC FOR THE 2019 PERMIT CLEARLY EXPLAIN THE REGION'S POSITION REGARDING EARLIER CPTs

Petitioner also implies that Region 5's response to the Petitioner's concern that the 2018 Draft Permit did not contain multi-metals monitors is "clearly erroneous" because without a requirement for multi-metals monitors, the 2019 Permit will not ensure compliance with the CAA. Petition at 26-32. To support this argument, Petitioner implies that the 2019 Permit decision is "clearly erroneous" because Region 5 reached a different conclusion when looking at the same facts when the Region made its 2017 Permit decision. Petition at 26-32. Petitioner faults Region 5 for reevaluating the same facts and reaching a different conclusion:

- "[in 2019] EPA claims the earlier exceedances were anomalous" Petition at 29.
    - 2006 CPT violation of the LVM standard. Petition at 27
    - 2008 CPT violation of the SVM standard. Petition at 27-28.
    - 2013 CPT was inconsistent with the earlier CPTs. Petition at 28-29.

As noted above, simply because the Region reached a different conclusion in 2019 than it did in 2017 does not in and of itself make the decision "clearly erroneous" because the administrative caselaw addresses changes in final action of the Agency and the 2017 Permit was not final agency action. In any event, Region 5 *can* reevaluate the same facts and reach a different conclusion as part of proper decision-making in a permitting matter so long as it explains its reasoning. Furthermore, Petitioner's current claims largely echo its public comments on the CPTs, which were fully addressed in the RTC.

In section D.11 of the RTC, the Region explained, as it had in the 2018 SOB, "that the data relating to LVM or SVM emissions involved anomalous results from a single performance test involving lead (an SVM) and another performance test involving arsenic (an LVM), and EPA concluded that these anomalous single data points were not enough to support a conclusion that multi-metals monitoring devices were necessary." RTC at 30. Contrary to Petitioner's assertion, the Region *did* explain its confidence in the results of the 2013 CPT testing, indicating that "the causes of these anomalous results appear to be rectified" given that they were not repeated in subsequent CPT results. Specifically, the Region indicated that "Veolia demonstrated a large margin of compliance in its 2013 performance test," with all variability with respect to SVM and LVM emissions "confined within a very narrow band at the low end of the emission standards." *Id*.

Petitioner has provided no evidence or arguments to contradict the Region's technical judgment on these matters, nor has Petitioner demonstrated that the Region's reasoning, fully explained in the 2019 RTC, was erroneous in any way. First, Petitioner discusses the history of the Region's consideration of the 2006 and 2008 CPT results, but does not provide a single argument contradicting the Region's characterization of these test results as "anomalous," nor

the Region's conclusion that the causes of these aberrant results—whatever they might have been—have since been rectified. *See id*. at 28-29.[10]

Petitioner also provides a one-sentence assertion that "[t]he 2013 CPT had results that could not be lined up with the results of either previous CPT," attributing this statement to the Region's RTC issued with the 2017 Permit. *Id*. at 28. Not only does Petitioner omit any discussion of why this statement might undermine the 2013 CPT results, but Petitioner also mischaracterizes the cited portion of the record supporting the 2017 Permit. The cited portion of the 2017 RTC related primarily to concerns with the variability in emissions given a known feedrate, was not specific to LVM and SVM, and said nothing that would specifically undermine confidence in the 2013 results. *See* 2017 RTC at p. 20. n.13. To the extent that emissions of LVM and SVM varied after adjusting for feedrates—whether comparing unit-by-unit or CPT-by-CPT—this variability was confined to a narrow band at the bottom of the HWC MACT standard (with the exception of the two anomalous results), and thus was inconsequential insofar as compliance with the HWC MACT is concerned. See 2019 RTC at 30-31.[11]

Petitioner's primary argument challenging the Region's reliance on the 2013 CPT appears to be a broad, generalized attack on the use of CPTs to assure compliance with HWC MACT limits as a general matter. *See* Petition at 29-30. This argument clearly fails given that EPA has, through rulemaking, determined that this method *is* generally acceptable to assure compliance with HWC MACT limits. Petitioner also briefly attempts to undermine confidence in Veolia's CPT results more specifically, briefly restating the Region's discussion in the 2017

[10] Petitioner also briefly summarizes information related to a spike in ambient arsenic levels in East St. Louis. EPA fully addressed related comments in the 2019 RTC. See 2019 RTC at 30 n.43.

[11] In contrast, prior to the addition of controls, mercury emissions were much closer to the HWC MACT standards and showed larger variability. *See* 2017 RTC at 15 ("[M]ercury emissions from Units 2 and 3 varied from 37% to 77% of the emission limit during the most recent CPT.")

RTC regarding the variability of LVM and SVM emissions even when CPT feedrates of these metals were equal. However, as noted above, the Region clearly explained in the 2019 RTC (and 2018 SOB) that this observed variability, confined to the extreme low end of the MACT standard, provided no basis for determining that multi-metals monitors were necessary with respect to LVM or SVM. RTC at 30-31. In sum, Petitioner is plainly incorrect to suggest that "EPA does not offer an explanation for its decision to abandon a condition that would have verified the link between the metals feedrate and metals emissions other than the 2013 CPT's demonstration of compliance," Petition at 30. Moreover, Petitioner has provided no basis to undermine the Region's technical judgment that the 2013 CPT results confirmed that the anomalous CPT results from 2006 and 2008—the primary data points suggesting the need for multi-metals monitoring with respect to LVM and SVM—had been rectified.[12]

B. THE REGION'S 2019 PERMIT DECISION REGARDING FEEDSTREAM ANALYSIS PROCEDURES FOR MACT METALS IS APPROPRIATE

As Petitioner notes, its November 5, 2018 comment raised the issue of the adequacy of the feedstream analysis procedures for MACT metals at Condition 2.1(D)(4)(d)(ii) in the 2018 Draft Permit. *See* Comment 323, Docket ID EPA-R05-OAR-2014-0280-0459. After considering this comment, Region 5 concluded that the feedstream analysis procedures for MACT metals at Condition 2.1(D)(4)(d)(ii) in the 2018 Draft Permit were appropriate for inclusion "as-is" in the 2019 Permit, and explained the basis for this decision in the RTC at Section II.C, at pp. 51-56.

[12] Additionally, although Petitioner contends that EPA "considered no new evidence (at least that was placed in the administrative record)," Petition at 31, Petitioner acknowledges that the Administrative Record for the 2019 Permit included the January 2019 CPT Report, which detailed the results of the most recent 2018 CPT, Petition at 17 n.55. Although the Region has not yet incorporated those results into Veolia's permit and the Region did not expressly rely on those results to support its decisions in the 2019 Permit, the Region notes that Veolia demonstrated comparably low LVM and SVM emissions in the 2018 CPT as it did in its 2013 CPT. These most recent results are further evidence of the reasonableness of the Region's reliance on the 2013 CPT results and its resulting conviction that the anomalous 2006 and 2008 LVM and SVM results had been rectified.

Petitioner has not demonstrated why Region 5's response to this objection in the RTC is clearly erroneous. *See In re Guam Waterworks Auth.*, 15 E.A.D. 437, 444 (EAB 2011). To begin, Petitioner indicates that EPA's decision to stay with the 2018 Draft Permit language for feedstream analysis procedures for MACT metals at Condition 2.1(D)(4)(d)(ii) was "clearly erroneous" because Region 5 reached a different conclusion looking at the same facts when the Region made its 2017 Permit decision. Petition at 20-22. Petitioner faults Region 5 for reevaluating the same facts and reaching a different conclusion. However, as noted in Section IV. A of this Response to Petition, above, Region 5 may appropriately reevaluate the same facts and reach a different conclusion as part of proper decision-making in a permitting matter.[13] Furthermore, Petitioner's comments on the feedstream analysis procedures were addressed in the RTC.[14]

Petitioner concedes that the feedstream analysis procedures for MACT metals at Condition 2.1(D)(4)(d)(ii) in the 2019 Permit are an "improvement over the system Veolia used before" but Petitioner "does not believe that this system contains a sufficient amount of actual testing [of waste entering the incinerator] to resolve issues identified" by EPA in earlier documents—specifically the NEIC Report and the 2017 Permit's RTC. Petition at 23. Petitioner also implies that the use of suspect and non-suspect waste categories in Condition 2.1(D)(4)(d)(ii) in the 2019 Permit is problematic. Petition at 22 and 25. Petitioner also

[13] As noted above, this is even assuming that the administrative caselaw the Petitioner fundamentally relies upon applies in this circumstance, where there was no final permit decision by EPA to which one can compare a change in course.

[14] The Petition states that "the feedstream analysis procedures in the 2019 permit are based on discussions with Veolia that took place in 2015 [footnote omitted]." Petition at 22. This is not accurate. The feedstream analysis procedures for MACT metals at Condition 2.1(D)(4)(d)(ii) in the 2019 Permit are based on revisions to the January 2017 Permit consistent with the 2018 Settlement Agreement which was discussed between EPA and Veolia from March to October 2017 (although some of the same concepts were discussed between Region 5 and Veolia in 2015). See RTC at pp. 9-10, 21-22, 66-67, 73.

complains that the 2019 Permit allows Veolia to use "broad categories [of waste] even in circumstances where there is tremendous variation within the category." Petition at 24.

The Board should reject these arguments and defer to the reasoned technical judgment of the Region. First, the Petitioner is incorrect that the 2019 Permit does not contain sufficient testing of waste streams. In Section II.C. of the RTC for the 2019 Permit, EPA explained that due to the large quantity of feedstreams Veolia incinerates annually, it would be impractical for Veolia to "sample and analyze" each feedstream for metal content. RTC at 54. The HWC NESHAP does not require that feedstream analysis procedures require the testing of each shipment or each feedstream. 40 C.F.R. § 63.1209(c)(2)(ii) (requiring the feedstream analysis procedures to specify whether the Permittee will obtain the "analysis" required by 40 C.F.R. § 63.1209(c)(1) "by performing sampling and analysis or by other methods, such as using analytical information obtained from others or using other published or documented data or information."). The Region reasonably considered the concern about metal content in waste streams and the burden of additional testing to strike a reasonable balance regarding the actual testing of waste streams. The Petitioner's argument amounts to little more than a desire for the Region to require more actual testing with scant demonstration that the conditions, taken as a whole (including the requirement to use controls and monitor many other parameters), are insufficient to assure compliance with the numerical emission limits. This evaluation is precisely the kind of technical and scientific judgement to which the Board should defer. *See, e.g.*, *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 510, 561-62, 645-47, 670-74 (EAB 2006). For instance, the Region determined that because of the physical or chemical characteristics of some wastes, certain feedstreams cannot be safely sampled or analyzed using available analytical procedures. RTC at 54. Instead, for such feedstreams, Veolia must determine

and document the metal content of the feedstream using generator knowledge, safety data sheets, and container labels for the purpose of tracking metal feedrates. Any feedstream, even if exempted from sampling pursuant to Conditions 2.1(D)(4)(d)(ii)(F)(I)(aa) through (ff), for which there is insufficient information to allow Veolia to make a reasonable determination of the amount of metals present in the feedstream cannot be exempted from sampling and analysis under the terms of this final permit. *Id*. Veolia is not permitted to exempt waste from sampling and analysis unless the Region has approved an exemption for such waste. RTC at 56; Condition 2.1(D)(4)(d)(ii)(F)(I) and (IV). In the situations where a waste is impractical to sample due to safety or other concerns, Veolia must still estimate the metal concentrations in those wastes following the procedures discussed in the revised permit. RTC at 56; Conditions 2.1(D)(4)(d)(ii)(B)(VI), (F)(II) and (F)(III). Thus, under the revised permit's feedstream analysis procedures, feedstreams that were previously incinerated without representative sampling are now likely to be sampled and analyzed. RTC at 56. The Petitioner has failed to show that the Region's technical judgement regarding the feedstream analysis plan was clearly erroneous.

V. CONCLUSION

The Region's 2019 permit decision not to require multi-metals monitors and to include changes in controls at units #2 and 3 is appropriate since the Region's reevaluation of existing factual information in the 2019 Permit has resulted in a Title V permit that assures compliance with the CAA. Further, the inclusion of revised feedstream analysis procedures for MACT metals in the 2019 Permit has also resulted in a Title V permit that assures compliance with the CAA. The Region's 2019 permit decision is *not* based on a clearly erroneous finding of fact or conclusion of law as alleged by Petitioner. 40 C.F.R. § 71.11(l)(1)(i). Rather, the basis for the 2019 Permit decision is clearly explained in both the 2018 SOB and the 2019 RTC. The 2019

Permit should not be vacated as requested by Petitioner—and no portion of the 2019 Permit should be remanded to Region 5. The 2019 Permit was properly issued by Region 5, is more than adequately supported by the administrative record, and the EAB should deny the petition for review.

Date: December 9, 2019

Respectfully submitted,

/S/ Catherine Garypie

Catherine Garypie
Office of Regional Counsel, Region 5
U.S. Environmental Protection Agency
77 W. Jackson Blvd. (C-14J)
Chicago, IL 60604
312-886-5825
Garypie.catherine@epa.gov

John Krallman
Air and Radiation Law Office
Office of General Counsel (MC 2344-A)
Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, DC 20460
Telephone: (202) 564-0904
Facsimile: (202) 564-5603
Email: Krallman.John@epa.gov

STATEMENT OF COMPLIANCE WITH WORD COUNT LIMITATION

I hereby certify that this Response to Petition for Review submitted by EPA Region 5, exclusive of the Table of Contents, this Statement of Compliance, and the attached Certificate of Service, contains 8,185 words, as calculated using Microsoft Word word-processing software.

/S/ Catherine Garypie

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Catherine Garypie

CERTIFICATE OF SERVICE

I hereby certify that I caused an original of **EPA REGION 5'S RESPONSE TO PETITIONS FOR REVIEW** in the matter of Veolia ES Technical Solutions, LLC, EAB Appeal No. CAA 19-01, to be filed electronically to the Clerk of the Board and copies to be served by electronic mail upon the persons listed below.

Dated: December 9, 2019 */S/ Brittani Anderson*

_____

Brittani Anderson

Elizabeth Hubertz
Interdisciplinary Environmental Clinic
Washington University School of Law
One Brookings Dr.
St. Louis, MO 63130
ejhubertz@wustl.edu

Joseph M. Kellmeyer
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
jkellmeyer@thompsoncoburn.com