

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

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ORAL ARGUMENT

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ENVIR. APPEALS BOARD

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IN THE MATTER OF: :  
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ESSROC CEMENT CORPORATION, : RCRA Appeal No. :  
 : 13-03 :  
RCRA Permit No. :  
IND-005-081-541 :  
\_\_\_\_\_ :

Tuesday,  
March 11, 2014

Administrative Courtroom  
Room 1152  
EPA East Building  
1201 Constitution Avenue, NW  
Washington, DC

The above-entitled matter came on  
for hearing, pursuant to notice, at 10:31 a.m.

BEFORE:

THE HONORABLE LESLYE FRASER  
Environmental Appeals Judge

THE HONORABLE CATHERINE R. MCCABE  
Environmental Appeals Judge

THE HONORABLE KATHY A. STEIN  
Environmental Appeals Judge

APPEARANCES:On Behalf of ESSROC Cement Corporation:

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On Behalf of Amicus Curiae  
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ALSO PRESENT:

Eurika Durr, Clerk of the Board

\* *present via video-conference*

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

(10:31 a.m.)

MS. DURR: All rise.

Environmental Appeals Board at the United States Environmental Protection Agency is now in session for oral argument, ESSROC Cement Corporation, Permit Number IND-005-081-541, RCRA Appeal Number 13-03.

The Honorable Judges Catherine McCabe, Leslye Fraser, Kathy Stein presiding. Please turn off all cell phones, and no recording devices allowed. Please be seated.

JUDGE FRASER: Good morning. I am Judge Fraser, and on behalf of this panel I want to thank the parties for appearing today. I'd like to start with introductions starting with petitioner.

MR. SCHWORER: Philip Schworer with Frost Brown Todd representing ESSROC.

JUDGE FRASER: Good morning.

MR. SCHWORER: Good morning.

MR. STACHOWIAK: Robert

1 Stachowiak, EPA Office of General Counsel.

2 JUDGE FRASER: Good morning.

3 MS. ARGENTIERI: Sabrina  
4 Argentieri, Office of Regional Counsel, Region  
5 U.S. EPA.

6 JUDGE FRASER: Good morning.

7 MR. PALERMO: Mark Palermo, Office  
8 of Regional Counsel, Region 5.

9 JUDGE FRASER: Good morning.

10 COURT REPORTER: I'm having  
11 trouble hearing.

12 JUDGE FRASER: They're not  
13 speaking --

14 COURT REPORTER: Okay.

15 JUDGE FRASER: And for Cement Kiln  
16 Recycling Coalition on the panel?

17 MR. STOLL: Good morning. Can you  
18 see and hear me okay?

19 JUDGE FRASER: Very faintly.  
20 We'll adjust that in the courtroom.

21 MR. STOLL: Okay. Yes, Richard  
22 Stoll, representing the Cement Kiln Recycling

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1 Coalition.

2 JUDGE FRASER: Good morning, and I  
3 also understand we have Region 5 listening in  
4 from a conference room. So thank you  
5 everyone. We will first hear from petitioner,  
6 ESSROC, followed by the region.

7 Then we will have Cement Kiln  
8 Recycling Coalition and, again, the region  
9 will be able to respond to that with OGC  
10 support. As we've allocated the time, I  
11 understand petitioner, you've advocated or  
12 reserved ten minutes of your time for  
13 rebuttal.

14 MR. SCHWORER: That's correct,  
15 Your Honor.

16 JUDGE FRASER: And so I'll allow,  
17 you can figure out where you take that ten  
18 minutes. Are you taking it from five and five  
19 or just ten minutes at the end?

20 MR. SCHWORER: I'll take ten  
21 minutes at the conclusion.

22 JUDGE FRASER: Okay. Thank you.

1 And just to help keep things orderly, the  
2 other judges and I will first be asking the  
3 parties questions related to whether the  
4 region had authority to require a second site-  
5 specific risk assessment or an SSRA.

6 Then we will turn to the issue of  
7 whether the region erred in establishing the  
8 mercury feed rate limit. And, of course, we  
9 will raise any other questions that pertain to  
10 arguments you have in your briefs and that you  
11 raise here before us.

12 Any initial questions of  
13 clarification from anyone? Okay. Thank you.  
14 We'll get started.

15 MR. SCHWORER: Okay. Good  
16 morning, Your Honors.

17 JUDGE FRASER: Good morning.

18 MR. SCHWORER: My name is Philip  
19 Schworer. I'm counsel to ESSROC and  
20 appreciate the opportunity to have this oral  
21 argument with you all today and hope that it  
22 will be helpful.

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1           ESSROC has appealed the mercury  
2 feed rate limit of the permit, a single  
3 emission performance standard. And we asked  
4 that the board remand the permit with  
5 instructions that the mercury limit be removed  
6 from the permit or remand with instructions  
7 that the region and ESSROC complete the risk  
8 assessment that it started in 2012.

9           A petition, associated pleadings  
10 and administrative record support ESSROC's  
11 position that the region did not meet the  
12 burden in the permitting context to establish  
13 that the 2012 risk assessment was necessary as  
14 authorized by the regulation.

15           This burden was discussed in the  
16 CKRC II litigation that arises from Section  
17 270.10(11).

18           Importantly, we also will  
19 establish that burden through the Part 124  
20 requirements in that the permitting activities  
21 were clearly erroneous based on findings of  
22 facts or conclusions of law or that the board

1 in its discretion, should take up the  
2 consideration of this risk assessment.

3 JUDGE FRASER: Can I just ask a  
4 question of clarification? You initially said  
5 you wanted them to complete the 2012 risk  
6 assessment. So are you arguing that the  
7 region did not have authority to do a second  
8 risk assessment, or are you asking for an  
9 additional risk assessment now?

10 MR. SCHWORER: It's a two part  
11 argument, Your Honor, that initially the  
12 region did not have the authority to conduct  
13 the second risk assessment. Then the region  
14 conducted the second risk assessment and did  
15 not complete.

16 So, and as I get into my materials  
17 I'll give you the outline of the timing  
18 between the issuance of the draft permit, then  
19 the issuance or the ESSROC receiving the 2012  
20 draft report, and then basically the region  
21 not completing the risk assessment in  
22 accordance with the HHRAP guidance.

1 JUDGE FRASER: Okay.

2 MR. SCHWORER: I do want to start  
3 with a basic foundation that in 2003 ESSROC,  
4 with the assistance of a consultant, conducted  
5 a risk assessment, a full site-specific risk  
6 assessment, that was reviewed and approved by  
7 a U.S. EPA Region 5.

8 And then of course a RCRA permit  
9 was issued upon completion of that risk  
10 assessment. What we're talking about here is  
11 the renewal of the permit, which commenced in  
12 2008.

13 And basically from the period 2008  
14 to 2011-ish, ESSROC and the region had been  
15 working on obtaining site-specific  
16 information. So for example, ESSROC conducted  
17 performance tests on the kilns to determine  
18 the removal efficiency for the control  
19 devices.

20 ESSROC conducted speciation tests  
21 on the mercury content, mercury in the  
22 emission, in the --

1 JUDGE FRASER: And those years  
2 are, which years were you doing that?

3 MR. SCHWORER: In the 2008 to 2011  
4 time period.

5 JUDGE FRASER: Okay.

6 MR. SCHWORER: ESSROC and the  
7 region were in discussions with regards to  
8 three very important variables in the conduct  
9 of a risk assessment, fish consumption,  
10 bioaccumulation factors and methylation rate.

11 Now, the time line is very  
12 important to keep straight because it shows  
13 some challenges in communication. In, on July  
14 20, 2012, ESSROC receives the draft RCRA  
15 permit.

16 That draft RCRA permit has the  
17 mercury feed rate emission limit of 87.91  
18 pounds per year.

19 JUDGE STEIN: Can I ask a  
20 clarifying question?

21 MR. SCHWORER: Yes.

22 JUDGE STEIN: When you say you

1 received that permit, is this prior to the  
2 public comment process, or is this as part of  
3 the public comment process?

4 MR. SCHWORER: As part of the  
5 public comment process.

6 JUDGE STEIN: Thank you for the  
7 clarification.

8 MR. SCHWORER: Prior to that time,  
9 ESSROC had not seen what I'll call the 2012  
10 region risk assessment report. July 22nd the  
11 draft permit comes out, 87.91 pounds of  
12 mercury per year is the annual feed rate  
13 limit. Part of that permit package --

14 JUDGE FRASER: Mr. Schworer, if I  
15 can back up, you said you had not seen the  
16 draft risk assessment report, but did not the  
17 region notify you previously, maybe 2009, that  
18 they thought a second risk assessment was  
19 required to address the mercury feed  
20 deposition rate, dry deposition rate?

21 MR. SCHWORER: Correct. We were,  
22 in fact, in discussions with the region on

1 developing the site-specific factors.

2 JUDGE FRASER: And were, and the  
3 region conducted that risk assessment? Was  
4 ESSROC asked to conduct the risk assessment,  
5 and what was the interplay after ESSROC  
6 received notification a second risk assessment  
7 was required?

8 MR. SCHWORER: They were working  
9 with the agency to develop the data for the  
10 second risk assessment.

11 JUDGE FRASER: Okay.

12 MR. SCHWORER: And then what  
13 happened is in the draft permit package, there  
14 was a memo dated June 28, 2012 that calculates  
15 the mercury feed rate limit. In that memo, it  
16 states that the region had performed a site-  
17 specific risk assessment in June of 2012.

18 And again, ESSROC had no notice,  
19 had no review of that report, and in fact, was  
20 required to file an open records request to  
21 obtain a copy of the risk assessment report.

22 JUDGE FRASER: And that was not in

1 the administrative record when the draft  
2 permit went out for comment?

3 MR. SCHWORER: It was in the  
4 index.

5 JUDGE FRASER: So that's a yes?

6 MR. SCHWORER: It was not  
7 provided.

8 JUDGE FRASER: It was not, I'm not  
9 following. It was not provided as it was not  
10 accessible, or it was not sent to ESSROC or  
11 what do you mean if it was in the index but  
12 not provided?

13 MR. SCHWORER: I believe it was  
14 listed as a document but not the entire report  
15 --

16 JUDGE FRASER: Okay.

17 MR. SCHWORER: -- which is, the  
18 June 2012 risk assessment report conducted by  
19 the region is ten pages of text with a  
20 computer print out from an IRAP Internet based  
21 risk assessment tool.

22 JUDGE FRASER: Thank you.

1 JUDGE STEIN: I'm confused. Why  
2 is it that if it's in the administrative  
3 record you aren't able to go look at a copy of  
4 it?

5 MR. SCHWORER: Well, we did it.  
6 We filed an open record.

7 JUDGE STEIN: You could look at a  
8 copy. They just didn't provide you the  
9 courtesy of sending it to you.

10 MR. SCHWORER: Correct.

11 JUDGE STEIN: Thank you.

12 MR. SCHWORER: Correct, and as is  
13 important in kind of the theme of the HHRAP  
14 process that is an iterative risk assessment  
15 process, it would've been important for ESSROC  
16 to have seen the risk assessment report as a  
17 draft so that we could then collaboratively  
18 work to develop the correct assumptions for  
19 the risk assessment.

20 JUDGE FRASER: Mr. Schworer?

21 MR. SCHWORER: Yes.

22 JUDGE FRASER: I am somewhat

1 puzzled by the argument because I don't recall  
2 seeing the argument in the petition that  
3 ESSROC had not been given an adequate  
4 opportunity to do this risk assessment itself  
5 or to participate in it.

6           Could you site to us where in your  
7 petition you made that argument?

8           MR. SCHWORER: I'd have to look  
9 again. It's in the petition but not, frankly,  
10 with the clarity that I just presented in  
11 terms of the time line.

12           JUDGE FRASER: Well, of course as  
13 you know, it's important to preserve arguments  
14 to raise them to this board. So it's rather  
15 important for us to have the answer to that  
16 question as to whether you really preserved  
17 that argument.

18           MR. SCHWORER: And I can provide  
19 that to you.

20           JUDGE FRASER: Thank you.

21           MR. SCHWORER: Importantly, the  
22 June 2012 risk assessment performed by the

1 region was actually styled as a screening risk  
2 assessment.

3 Now that's important because it  
4 did not drill down to the level of detail on  
5 those variables that are critical to the risk  
6 assessment: fish consumption, bioaccumulation  
7 factor, and methylation. And time, I don't  
8 see a time.

9 MS. DURR: He's at 15, 15 more  
10 minutes.

11 MR. SCHWORER: Importantly in the  
12 HHRAP guidance, and clearly the region has  
13 indicated that it's followed HHRAP, this board  
14 is asked for comments with respect to that  
15 position in Question Number 3 as to whether or  
16 not the region followed the HHRAP guidance.

17 JUDGE FRASER: Can we go back up  
18 to the question of whether the region had the  
19 authority to require a second site-specific  
20 because I think that is the question you  
21 initially raised in your petition?

22 And so it seemed to read that you

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1 were arguing that if the operation stayed the  
2 same, and there were no changes in  
3 surrounding, then the region did not have  
4 authority to ask for a second site-specific  
5 given one had been done in 2003.

6 And so is it your position that  
7 even if there is a new pollutant that is  
8 discovered the region does not have the  
9 authority to do another risk assessment on  
10 that pollutant?

11 MR. SCHWORER: Well, a new  
12 pollutant discovered at the --

13 JUDGE FRASER: A new pollutant is  
14 emitted that the agency learns has significant  
15 health threats, significant health risks  
16 previously unknown.

17 MR. SCHWORER: I think it would  
18 depend on the pollutant and the science. As  
19 you know, 270.10(11)(8) is very specific that  
20 the decision with regards to a risk  
21 assessment, a second risk assessment is  
22 dependant upon the adequacy of the previously

1 conducted risk assessment giving any changes  
2 in condition likely to affect risk.

3 And as we go into the rule making  
4 process, we get very good guidance as to what  
5 that means.

6 JUDGE FRASER: But I still would  
7 like to go back and under that standard that  
8 you just articulated so there's no changes.  
9 Your argument is there were no changes in  
10 conditions at the facility.

11 It was operating the same. There  
12 were no changes in the surroundings. The lake  
13 was still in the same place. The lakes were  
14 still there.

15 If under my hypothesis, there is a  
16 discovery of information relating to a health  
17 threat previously unknown or undetected, is  
18 that, you're that under that scenario because  
19 the risk assessment had been done, the region  
20 does not have authority to do another one?

21 MR. SCHWORER: Under this section,  
22 yes. Now, I believe there would be other

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1 provisions within the general purview of RCRA  
2 in the permitting process for the agency to  
3 reopen a RCRA permit for example.

4 JUDGE FRASER: Well this is, let's  
5 say it's part of this permitting process.  
6 It's renewing. They're not reopening. You're  
7 coming for a renewal of your permit so that  
8 they don't have to reopen the current permit.

9 They're looking at requiring a  
10 second risk assessment to address that new  
11 threat. You're saying that there is no  
12 ability to do that because there already has  
13 been a risk assessment that did not include  
14 this pollutant.

15 MR. SCHWORER: That's correct.

16 JUDGE FRASER: And how would see  
17 that as meeting the RCRA standard independent  
18 of the MACT standard that you have to be, the  
19 agency has to issue a permit that ensures  
20 adequate protection of human health and the  
21 environment.

22 MR. SCHWORER: And that was

1 performed or determined, again, by virtue of  
2 the prior risk assessment. And the prior --

3 JUDGE FRASER: But the prior risk  
4 assessment hasn't addressed my new  
5 hypothetical pollutant. So we're just forever  
6 forbidden from regulating that pollutant  
7 because there has been a risk assessment done?

8 MR. SCHWORER: Under my, I think  
9 my answer would be, under reopening the permit  
10 would be the procedure. It would not be under  
11 the procedure of the determination with the --

12 (Simultaneous speaking)

13 JUDGE FRASER: And what would be  
14 the differences between the two processes in  
15 your mind in terms of outcome?

16 MR. SCHWORER: Timing,  
17 regulations, for example, the question about  
18 the change in science, which is, I think is  
19 part of your question with regards to the  
20 detection of a new chemical.

21 It's clear that when 27,  
22 270.10(11) was being developed, the concept of

1 changing science was certainly there within  
2 the minds of the regulatory, of U.S. EPA  
3 within the courtroom at the D.C. circuit.

4 Clearly at that point, if a change  
5 of science would trigger the conduct of a  
6 second risk assessment, it could've been said  
7 there. It should've been said there, and as  
8 a result vitiated all of 270.10(11).

9 And the concept of the emerging  
10 technology with regards to risk assessment,  
11 the emerging technology with regards to  
12 science is ever present.

13 And again I would submit that if  
14 the section contemplated the change in  
15 science, it should've said so and then in  
16 effect would have done away with the  
17 requirement because every kiln would've needed  
18 to conduct a risk assessment.

19 JUDGE FRASER: So the 2003 risk  
20 assessment stands in perpetuity as to never  
21 having an opportunity to be revisited for any  
22 of the pollutants is your argument, not 30

1 years from now, not 40 years from now if  
2 nothing changes at the facility?

3 MR. SCHWORER: Right, until  
4 there's been a change in operations or change  
5 in conditions surrounding. So, for example,  
6 the, a new process were to be installed.

7 JUDGE MCCABE: What if the change  
8 in science favor the company? What if we  
9 suddenly discover that mercury is less toxic  
10 than we thought?

11 MR. SCHWORER: That's probably a  
12 risk we each take, same with control  
13 efficiency.

14 JUDGE MCCABE: So under your view,  
15 the company would have no opportunity, even at  
16 the, regardless of the procedural stage,  
17 whether you're moving to reopen this or  
18 whether it's just a permit renewal, the  
19 company would never have the opportunity to  
20 raise that new science to the agency's  
21 attention?

22 MR. SCHWORER: Not within this

1 section.

2 JUDGE MCCABE: Then how?

3 MR. SCHWORER: Through reopening  
4 of the permit, through a new permitting  
5 process.

6 JUDGE STEIN: Can I direct your  
7 attention to 270.10(1), and I can't, to  
8 270.10(1) because I'm having trouble squaring  
9 your argument with the language of the  
10 regulation as I see it.

11 And as I'm reading, it says "if  
12 the director concludes, based on one or more  
13 of the factors listed in Paragraph L1 of this  
14 section, the compliance with the standards of  
15 Subpart EE alone may not be protective of  
16 human health or the environment.

17 The director shall require the  
18 additional information or assessments  
19 necessary to determine, to ensure protection  
20 of human health of the environment."

21 So when I read that standard, I  
22 don't see the restrictions that you impose.

1 I see a two step process. Is there, does EPA  
2 or did EPA conclude that the circumstances are  
3 such that it may not be protective?

4 If so, they then have a mandatory  
5 duty to evaluate further. That's a separate  
6 question from whether or not, from what action  
7 they take in response to that. But where in  
8 that language does it say that the agency  
9 can't conduct another risk assessment or  
10 require additional information?

11 MR. SCHWORER: I think what  
12 you're, what you observed is that the  
13 regulation pertains to facilities that have  
14 not conducted a risk assessment or maybe let's  
15 say a new RCRA permitted facility.

16 JUDGE STEIN: But where does it  
17 say that on the face of the regulation?

18 MR. SCHWORER: And then the second  
19 piece is where the adequacy of the first risk  
20 assessment based upon changing conditions.  
21 It's Subparagraph Little 8.

22 JUDGE STEIN: But I don't see the

1 restrictions. I mean you're assuming that  
2 this doesn't apply to somebody that's already  
3 done a risk assessment. Where in the language  
4 of the regulation does it say that?

5 MR. SCHWORER: Yes, and that's  
6 where you go to the preamble, and you go to  
7 the proposed rule for the discussion.

8 JUDGE STEIN: But you're willing  
9 to concede that there's nothing on the face of  
10 the regulation that compels your reading?

11 MR. SCHWORER: I think I would  
12 concede that.

13 JUDGE FRASER: If we can go,  
14 staying with the preamble language, and I'm  
15 going to refer to the page I believe the clerk  
16 of the board provided to you earlier from the  
17 federal register notice of the final MACT  
18 standard Page 59511, Volume 70 of the federal  
19 register.

20 In the middle of that paragraph,  
21 the agency discusses that generally they  
22 thought the MACT standards would be protective

1 and that facilities that had undergone the, an  
2 original site-specific risk assessment likely  
3 would not have to repeat it.

4 But it does note that the agency  
5 was not able to do that national, nationwide  
6 assessment for mercury and dioxins and some  
7 other pollutants.

8 And that in those instances, on  
9 case by case basis, the agency may need to do  
10 a second site-specific risk assessment. So  
11 how, why would you say the region has erred in  
12 this place when the preamble to the regulation  
13 already acknowledged that it had not been able  
14 to do a complete, nationwide assessment for  
15 all pollutants?

16 MR. SCHWORER: The statements with  
17 regards to the agency recognizing that, they  
18 recognized that not all, and I'm looking for  
19 my language, that they did not expect that the  
20 cement kilns would need to conduct another  
21 risk assessment.

22 JUDGE FRASER: But right above

1 that, in the highlighted language I provided  
2 you it says "the evaluation did not  
3 quantitatively assess the proposed standards  
4 with respect to mercury and non-dioxin  
5 products of incomplete combustion.

6 This was due to a lack of adequate  
7 information regarding the behavior of mercury  
8 in the environment and a lack of sufficient  
9 emissions data such as bioaccumulation  
10 factors."

11 And then it continues into the  
12 next column. And it says, "thus for both  
13 Phase 1 and Phase 2 sources we continue to  
14 believe that SSRAs may be necessary for some  
15 facilities."

16 Then there is that footnote that  
17 you rely upon, but there is the rest of the  
18 preamble language that you seem to be  
19 ignoring. So how do you square those two with  
20 the express recognition that mercury had not  
21 been completely addressed in this preamble or  
22 in this final rule?

1 MR. SCHWORER: We would anticipate  
2 that the risk assessment would not have to be  
3 entirely redone, for example.

4 JUDGE FRASER: But the MACT  
5 standards govern seven plus pollutants, do  
6 they not?

7 MR. SCHWORER: I believe so.

8 JUDGE FRASER: And so I don't  
9 think in this case the region did a complete  
10 second risk assessment for all pollutants.  
11 They focused on mercury is my understanding  
12 from your petition. So would you say that the  
13 risk assessment had been completely redone in  
14 this case?

15 MR. SCHWORER: No. The risk  
16 assessment has not been completely redone.

17 JUDGE FRASER: So how has, how is  
18 your, I'm not following the argument where the  
19 region has erred in this instance under the  
20 language of the reg and the language in the  
21 preamble.

22 MR. SCHWORER: Right. Our

1 position is that the region erred in  
2 conducting, in requiring the conduct of the  
3 second risk assessment and then secondarily,  
4 the conduct of the second risk assessment has  
5 not been completed.

6 JUDGE FRASER: And did you raise  
7 the conduct of the second risk assessment in  
8 your comments to the, on the draft permit?

9 MR. SCHWORER: Yes. The  
10 discussions with regards to the fish  
11 consumption variable, the bioaccumulation  
12 variable, the methylation variable --

13 JUDGE FRASER: Okay.

14 MR. SCHWORER: -- have been  
15 subjects of discussions throughout the comment  
16 period. The, again, the timing of the issue  
17 was, those have been, our opinion, adequately  
18 resolved. I did in my --

19 JUDGE FRASER: Well, if we can  
20 turn to your arguments on the adequacy of the  
21 mercury feed rate limit, and we could turn to  
22 that, what is your current mercury feed rate

1 limit in the 2003 permit?

2 MR. SCHWORER: I'd have to check  
3 the record, Your Honor.

4 JUDGE FRASER: Well, we could not  
5 find it in the record, which is why I'm  
6 asking.

7 MR. SCHWORER: I can get that for  
8 you.

9 JUDGE FRASER: Okay. And do you  
10 know what bioaccumulation factor was used to  
11 calculate that limit and what assumptions were  
12 made for that?

13 MR. SCHWORER: With regards to the  
14 '03 risk assessment, we'd have to look at the  
15 '03 risk assessment. Is my time up? I did  
16 want to comment on the Question Number --

17 JUDGE FRASER: You have five more  
18 minutes.

19 MR. SCHWORER: Oh, five more  
20 minutes, comment on Question Number 2, which  
21 is the catch all provision, Little 9 and  
22 specifically under the theory ejusdem generis,

1 which is developed in the D.C. Circuit Court,  
2 the provision of that catch all is limited by  
3 the concept of the first three or first eight  
4 subsections.

5 And again, our position is that  
6 science, the change of science does not enter  
7 into those provisions.

8 JUDGE FRASER: But the region  
9 didn't cite Subsection 9 in its letter to you  
10 as the basis for the second risk assessment.  
11 It cited four of the other subsections, but  
12 nine was not listed.

13 It relied on proximity to the  
14 lakes, the toxicity of the pollutant that was  
15 being emitted and the lack of the dry vapor  
16 deposition testing among things.

17 MR. SCHWORER: Changes in science.

18 JUDGE FRASER: Okay. Given that  
19 the board generally defers to the region on  
20 technical matters, and some of the arguments  
21 you're raising are, include the region didn't  
22 use the correct bioaccumulation factor that

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1 you think they should've used, what is your  
2 basis that you think the board should depart  
3 from that normal posture of deferring to the  
4 region?

5 MR. SCHWORER: Yes, in this  
6 situation under the HHRAP guidance, the region  
7 was performing the role of the risk assessor  
8 in addition to the permit writer.

9 In the context of the risk  
10 assessor, the region did not follow through on  
11 a good number of HHRAP requirements. For  
12 example, there's no discussion in the 2012  
13 risk assessment performed by the region that  
14 addresses an uncertainties analysis with  
15 regards to the variables that are issue.

16 HHRAP recognizes the discussion of  
17 uncertainties is critical to the confidence  
18 within a risk assessment. The ability to  
19 drive down the variables, to drive down the  
20 uncertainties increases confidence in the risk  
21 assessment.

22 In effect, what the region did

1 with the 2012 risk assessment is brand the  
2 program with the default values and then  
3 stopped, found the unacceptable risk and then  
4 went into deriving the feed rate limit.

5 What they should have done was  
6 evaluated those variables, those uncertainties  
7 with regards to fish consumption, methylation,  
8 bioaccumulation, evaluated the impact of those  
9 uncertainties and then developed additional  
10 information, quite possibly site-specific  
11 information, prior to issuing the risk  
12 assessment report.

13 JUDGE FRASER: Do we have any  
14 other questions?

15 JUDGE STEIN: I guess I just have  
16 one. I was under the impression from reading  
17 this record that ESSROC had an opportunity but  
18 declined to participate in the second site-  
19 specific risk assessment.

20 And correct me if I'm covering  
21 territory that Judge Fraser already has, but  
22 in listening to your arguments, it would be

1 particularly helpful for me to understand  
2 whether ESSROC had essentially waived their  
3 opportunity to make the kind of critique that  
4 you're suggesting by its failure to  
5 participate earlier in the process.

6 MR. SCHWORER: Yes. Our position  
7 would be that the agency, the region, and  
8 ESSROC were working together in developing  
9 site-specific variables.

10 And again, I cited examples of  
11 variables that were developed, the system  
12 removal efficiency, the speciation of the  
13 mercury emissions from the stacks.

14 What happened was there was a  
15 dialogue with regards to fish consumption,  
16 bioaccumulation, methylation. And then the  
17 discussion stopped. The region ran the  
18 computer model and then issued the draft  
19 permit.

20 And there was no continued  
21 dialogue, discussions, within HHRAP it's clear  
22 that that's an iterative process. When you

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1 conduct a risk assessment, you develop  
2 variables.

3 You refine variables. You do this  
4 work in an iterative process, and what  
5 happened was the iteration, the iterative part  
6 stopped. The permit was issued. We were then  
7 in a draft permit, 60 days to respond to the  
8 comments. The ability to develop site-  
9 specific information had ended.

10 JUDGE STEIN: So are you telling  
11 us that, but for the region cutting off this  
12 iterative process we wouldn't be here today,  
13 that if you had the opportunity to further  
14 work with the region that all of this,  
15 discussions and argument would be unnecessary?  
16 Is that what this case is about?

17 MR. SCHWORER: I leave that as a  
18 distinct possibility, and again, our request  
19 for relief is either the risk assessment  
20 should not have been, either the second risk  
21 assessment should not have been done at all,  
22 or it should be remanded so that we and the

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1 region can finish the work pursuant to HHRAP.

2 JUDGE FRASER: You have a few  
3 more?

4 JUDGE STEIN: No.

5 JUDGE MCCABE: Taking you back to  
6 the argument about new science and whether new  
7 science can be considered under this section  
8 of the regulations, you made it very clear  
9 that your position on that in no, that it  
10 cannot be.

11 What about a mistake? What if the  
12 region determined that it made a mistake in  
13 approving the risk assessment that I  
14 understand ESSROC did in 2003, that it perhaps  
15 had not paid enough attention to or even  
16 noticed these nearby lakes? Can the region go  
17 back under 270.10(1) and correct a mistake?

18 MR. SCHWORER: I would, first the  
19 '03 risk assessment was reviewed and approved  
20 by the region, but let's assume that there was  
21 a mistake and that something was left out.

22 I believe the procedure to be used

1 there would be through the reopening of the  
2 RCRA permit through the traditional reopening  
3 process.

4 JUDGE MCCABE: And would you  
5 recognize their ability to do that also in the  
6 renewal process?

7 MR. SCHWORER: Not under this  
8 section because this is dealing with the  
9 compliance with that, the HWC MACT.

10 JUDGE MCCABE: Could they say this  
11 is a combination reopener and renewal process,  
12 and would that satisfy your concerns?

13 MR. SCHWORER: Probably slicing it  
14 a little better there, but the point being  
15 that when 27 or 270.10(1) was being  
16 promulgated, if a change in science was what  
17 the agency was after, then the whole section  
18 because illusory because there's always  
19 changes in risk assessment.

20 There's always changes in the  
21 procedures, the calculations, the  
22 methodologies because that's what science does

1 is steps forward all the time. This section  
2 has no purpose then.

3 JUDGE MCCABE: Science changes,  
4 and we like to think our rules are flexible  
5 enough to change with it. Thank you, Mr.  
6 Schworer. Oh, let me ask you one more  
7 question.

8 Do you know what additional  
9 pollution equipment the company would have to  
10 install in order to meet EPA's new, more  
11 stringent standard and how much it would cost?

12 MR. SCHWORER: New, more stringent  
13 standard. The HWC MACT?

14 JUDGE FRASER: The 89.71 mercury  
15 feed rate.

16 MR. SCHWORER: Of course, because  
17 that's a feed rate limit. That's not an  
18 emission limit, so the limit that we're  
19 appealing is the mercury content of the raw  
20 materials, the raw waste materials coming into  
21 the process, not going out.

22 JUDGE MCCABE: Which influences

1 what goes out the other end, which is the  
2 source of the region's concern as to public  
3 health as I understand it. But do you know  
4 what further effort the company would have to  
5 go through, effort and expense, to meet this  
6 rate?

7 MR. SCHWORER: No, I'm sorry. I  
8 do not.

9 JUDGE MCCABE: Thank you.

10 JUDGE STEIN: I had one more  
11 question about your reference to the RCRA  
12 reopening regs. I'm presuming you're  
13 referring to the regulations on modification.

14 And I was wondering if you could  
15 answer two questions for me. One, did you  
16 raise this in your comments? And two, my  
17 recollection of those regulations is that you  
18 pretty much have to open, reopen for cause.

19 And I was wondering if you could  
20 explain exactly how you think this  
21 circumstance would fit into the reopener  
22 regulations.

1 MR. SCHWORER: Well, I would argue  
2 that the emission of let's say a receptor in  
3 a risk assessment would be that which the  
4 region would argue is the cause to reopen the  
5 permit.

6 JUDGE STEIN: So you wouldn't  
7 object if they reopened the permit for cause?

8 MR. SCHWORER: Well, you'd have  
9 the review rights under that procedure, would  
10 you not? You would --

11 JUDGE STEIN: But aren't RCRA  
12 permits designed to be five year permits, and  
13 we're now in 2014. And we're talking about a  
14 2008 permit. Can you explain why it would  
15 make sense to reopen for cause rather than to  
16 address this at the time of a new permit?

17 MR. SCHWORER: Just other than the  
18 procedure of keeping this section 270.10(1) in  
19 that separate container, if you will.

20 JUDGE STEIN: Right, and we have  
21 different views on what kind of container it  
22 really is, whether it's got a couple of leaks

1 in it.

2 JUDGE FRASER: Thank you very  
3 much.

4 MR. SCHWORER: And then ten  
5 minutes for rebuttal?

6 JUDGE FRASER: Yes. Now hear from  
7 general counsel in the regions. Thank you.

8 MR. STACHOWIAK: Good morning.

9 JUDGE FRASER: Good morning.

10 MR. STACHOWIAK: May it please the  
11 board, my name is Robert Stachowiak, and I  
12 will be representing EPA with respect to two  
13 of the three issues before it this morning.

14 Specifically I will address Issue  
15 1, scope of the authority in 270.10(1)(1)(8)  
16 and Issue 2, interpretation to be given to  
17 270.10(1)(1)(9) in light of the D.C. Circuit's  
18 opinion in CPRC and EPA.

19 With me at counsel table is Ms.  
20 Argentieri, of course. And she will be  
21 addressing Issue 3. Now before I get to the  
22 heart of the matter, I do want to provide a

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1 brief procedural note.

2 Unless the board has concerns with  
3 the approach, we would like to divide our time  
4 consistent with how we said we would in the  
5 presentation of oral argument, so specifically  
6 I'd like to address Issues 1 and 2 for 20  
7 minutes.

8 And then Ms. Argentieri will  
9 address Issue 3 for 15. For the ten minutes  
10 after CPRC's argument, we'd like to reserve  
11 five minutes a piece to respond to any  
12 additional points that they may raise during  
13 their time.

14 JUDGE FRASER: Thank you. That's  
15 fine.

16 MR. STACHOWIAK: Now turning to  
17 the issues at bar. EPA's interpretation of  
18 270.10(1) is reasonable and consistent with  
19 the language that, the statements in the  
20 preamble and EPA statements to the D.C.  
21 Circuit.

22 It is crucial that the board

1 recognize that petitioner's suggested  
2 alternative unreasonably creates an artificial  
3 ceiling when considering facility risks.

4 And their claims are essentially  
5 repackaged legal arguments that have already  
6 been rejected twice by EPA and by the D.C.  
7 Circuit. I'd like to begin with these latter  
8 two arguments and then come back to the  
9 language arguments about the reg in a moment.

10 As I said, it is essential to  
11 understand that under petitioner's view of the  
12 regulation, the permit writer would only  
13 follow the science where it benefits the  
14 facility instead of allowing science to add or  
15 reduce permit requirements as appropriate.

16 What I mean here is that the  
17 inquiry under 270.10(1) regarding whether or  
18 not a revised risk assessment is necessary  
19 always begins from the question of whether the  
20 MACT standards may be protective.

21 So if they are protective, then a  
22 pre-existing risk assessment is irrelevant.

1 But consider what happens when they're not.  
2 In that case, then you look at the pre-  
3 existing risk assessment under Factor 8.

4 But in that instance, under  
5 petitioner's stated view of the regulations,  
6 a permit writer would be bound to accept even  
7 an outdated or scientifically inadequate risk  
8 assessment at least absent changes in facility  
9 or site conditions.

10 JUDGE FRASER: Well, how do you  
11 respond to the petitioner's claim that science  
12 is always changing, and if you allow science  
13 to be the way of reopening or requiring a  
14 second risk assessment, you're allowing the  
15 exception to swallow the whole?

16 MR. STACHOWIAK: So petitioner's  
17 and CCKRC, they argue that if you don't drop  
18 this bright line rule that they purport to  
19 find in the interpretation of Factor 8, that  
20 there are no limits on when a new risk  
21 assessment can be required.

22 But that is simply not the case.

1 The regulation provides a structure that  
2 requires the agency to justify its decision on  
3 specific terms.

4 So in this case, the region sent  
5 ESSROC a letter explaining why it thought that  
6 portions of its risk assessment needed to be  
7 updated and cited specific sections of  
8 270.10(1).

9 Remember that under our  
10 interpretation of the regulations, parties are  
11 free to challenge that conclusion on its fact,  
12 to challenge the conclusion that the region  
13 has not adequately supported its conclusion  
14 that a revised risk assessment is necessary.

15 But that is not the claim that  
16 they brought here. In this case there's no  
17 argument that dry deposition of mercury is a  
18 relevant risk pathway and that dry deposition  
19 mercury was not adequately accounted for in  
20 the 2003 risk assessment.

21 Instead, they brought a facial  
22 legal challenge saying that EPA lacks even the

1 authority to examine whether they're prior  
2 risk assessment was adequate. And this is  
3 clearly, excuse me. And that is clearly  
4 easily rejected on the face of the regs.

5 JUDGE FRASER: So the gist of your  
6 argument is we could affirm that the agency  
7 had the authority to require the second site-  
8 specific risk assessment but that they still  
9 did not meet their burden of demonstrating one  
10 was necessary here?

11 MR. STACHOWIAK: I would submit  
12 that that would, the second half of that is  
13 simply not something the petitioner  
14 challenged. They did not say that the  
15 conclusions that the region reached, as  
16 documented in that letter, were improper.

17 They haven't challenged that dry  
18 mercury deposition isn't relevant to their  
19 facility. They haven't challenged that it's  
20 not relevant to the risks from the facility.  
21 And so that's simply not part of what they're,  
22 what we're facing here.

1 JUDGE FRASER: But they did  
2 challenge whether the region used the correct  
3 bioaccumulation factor, didn't they?

4 MR. STACHOWIAK: They challenged  
5 how they did the risk assessment but not the  
6 question about whether or not they adequately  
7 justified requiring a risk assessment in the  
8 first place.

9 JUDGE FRASER: Well, they did.  
10 They said conditions didn't change at the  
11 facility. The lakes didn't move. There's  
12 nothing new, and when they cited what the  
13 agency stated at oral argument and CKRC II  
14 versus EPA, they said this doesn't fit  
15 anything that the agency purported the reg  
16 stood for.

17 MR. STACHOWIAK: So, but what  
18 they're challenging is based upon their  
19 restrictive interpretation of that Factor 8.  
20 In other words, they're saying that there's a  
21 legal issue here, that Factor 8 can't be read  
22 to encompass the challenges to the science and

1 that the only thing that Factor 8 encompasses  
2 in changes in facility conditions or changes  
3 in site conditions.

4 JUDGE FRASER: Okay.

5 MR. STACHOWIAK: My --

6 JUDGE STEIN: Are you hinging your  
7 argument only on Factor 8 or on other factors?  
8 I'm confused by some language used when you  
9 started your argument as whether EPA's  
10 argument here is based exclusively on Factor  
11 8 or on other factors as well.

12 MR. STACHOWIAK: So the petitioner  
13 in their petition for review is only relying,  
14 effectively they're relying on Factor 8. They  
15 do acknowledge that Factor 9 could be  
16 relevant.

17 And so that's what the briefs  
18 address. Though it is true that the letter  
19 from the regional permit writer to ESSROC  
20 cites several factors under 270.10(1). So my  
21 second key point is that --

22 JUDGE STEIN: Before you go to

1 your second key point, so is the region  
2 arguing or not arguing that it relied on some  
3 of those other factors?

4 I understand your argument about  
5 what the petitioner is challenging, but I'm  
6 asking what the region's position is.

7 MR. STACHOWIAK: To the extent  
8 that it goes to sort of the nitty gritty of  
9 the record and the region's decision making  
10 process, I perhaps am not in the best position  
11 to address all of that.

12 And my co-counsel can address that  
13 when she comes up, or if you'd like her to  
14 come up now, we can do it then. But --

15 JUDGE FRASER: We'll wait for her  
16 to come.

17 MR. STACHOWIAK: Okay. But it is  
18 clear that the region in the record cited  
19 several factors under 270.10(1) beyond Factor  
20 8. So my second key point is that EPA has  
21 been clear since the regulation was first  
22 issued that a case by case approach to

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1 evaluating risk is appropriate.

2 The regulation embodies this  
3 approach, and this is exactly what the region  
4 did here. But the petitioners, they're trying  
5 to change that. They're trying to change that  
6 case by case approach into a guarantee that  
7 once they've done a risk assessment they won't  
8 have to again.

9 In other words, they're trying to  
10 change what clearly the regulation's put, set  
11 out as a factor into a definitive test. And  
12 this has been rejected twice by EPA in their  
13 rule-making 2005, by the D.C. Circuit in 2007.

14 And the board should not allow  
15 them to re-litigate this now almost seven  
16 years after the D.C. Circuit's decision.

17 JUDGE FRASER: Can you give us a  
18 sense of what the agency meant by the terms  
19 "changes in conditions likely to affect risk  
20 beyond operating conditions?" I'm aware that  
21 would be given in the record in the preamble  
22 guidance documents.

1 MR. STACHOWIAK: Are you asking  
2 for a statement that says everything that can  
3 be considered under that factor?

4 JUDGE FRASER: I'm asking for  
5 other examples. It seems like a lot of this  
6 conversation, debate in the pleadings has been  
7 changes in conditions being related to  
8 operating conditions.

9 And even when you look at the  
10 testimony or the oral argument at CKRC II,  
11 that was along the same lines. And I'm asking  
12 are there other examples of what the agency  
13 meant in changes and conditions likely to  
14 affect risk and where we could find that.

15 MR. STACHOWIAK: I don't think the  
16 agency attempted to identify all of the  
17 possible examples. I think those statements  
18 in the preamble, they tend to repeat the same  
19 examples. And you see a lot of those examples  
20 --

21 JUDGE FRASER: Yes.

22 MR. STACHOWIAK: Right, but I

1 think that sort of, it goes more to illustrate  
2 the point which is that EPA did not attempt to  
3 identify every circumstance under which a  
4 revised risk assessment would be necessary.

5 So, and in the plain language of  
6 that provision, is not limited to just those  
7 two, just changes in site conditions or  
8 changes in facility conditions.

9 JUDGE FRASER: But isn't that the  
10 gist of the petitioner's argument is that the  
11 agency went to great lengths repeatedly every  
12 time they explained what that term meant, to  
13 say that it only related to operating  
14 conditions.

15 It seems to be that's the point  
16 they're arguing here that now we're sweeping  
17 in, or the region is sweeping in science as  
18 part of that changes in conditions.

19 MR. STACHOWIAK: I think that's  
20 what they're arguing. I don't think that's an  
21 accurate characterization of what's in the  
22 preambles and the other statements.

1 I think it's pretty clear that  
2 those statements are statements either of  
3 expectations or providing examples. But  
4 they're not an attempt to say that those are  
5 the only things that could be encompassed  
6 within the terms of that reg.

7 And that's carried forth by just  
8 looking at the terms of the factor itself. It  
9 says "adequacy of any preexisting risk  
10 assessment considering changes in conditions  
11 likely to affect risk."

12 Changes in conditions is not  
13 limited to changes in site conditions or  
14 changes in facility conditions. That phrase  
15 can easily encompass changes to the science as  
16 well.

17 So going back to my second big  
18 point, the regulation was drafted as it was  
19 with an open ended list of factors and a  
20 refusal to establish a bright line rule.

21 And without attempting, as I said,  
22 to definitively identify every circumstance

1 under which a revised risk assessment would be  
2 necessary because the agency understand that  
3 it could not do that.

4 The factors identify  
5 considerations that the agency is to weigh in  
6 determining whether the MACT standards may be  
7 protective. But they are not, in themselves,  
8 independent findings that have to be met.

9 The EPA even expressly rejected a  
10 bright line approach in the final preamble.  
11 So if I can quote for a second, EPA said "the  
12 commented apparently misunderstands that the  
13 factors were not intended to function as  
14 standalone criteria for requiring a risk  
15 assessment.

16 This is an incorrect reading of  
17 EPA's proposed regulation. Rather the factors  
18 were always intended to function as  
19 considerations that might be relevant to the  
20 determination of whether the MACT would be  
21 sufficiently protective."

22 JUDGE STEIN: Where are you

1 reading?

2 JUDGE FRASER: For the record,  
3 yes, sorry. For the record can you site the  
4 page number?

5 MR. STACHOWIAK: Sure. That's at  
6 70-FR-595-09.

7 JUDGE FRASER: Thank you.

8 MR. STACHOWIAK: Moreover, the  
9 D.C. Circuit did not construe the regulations  
10 so narrowly either. The regulation simply  
11 refers to the term conditions.

12 A term that like board, the D.C.  
13 Circuit used, circumstances encompasses a wide  
14 variety of changes including evolution of the  
15 science and risk assessment modeling.

16 As the D.C. Circuit concluded, and  
17 again I'll quote here, this time with the  
18 site, "EPA has reasonably explained why it  
19 chose the case by case approach.

20 We find nothing unreasonable about  
21 EPA's refusal to interpret RCRA to require a  
22 national standard for ordering a risk

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1 assessment, SSRA, or granting a permit."

2 That's it, 493F.3rd at 223 to 224. Now --

3 JUDGE FRASER: If I could ask a  
4 question on that point, the CKRC II decision  
5 was arguing about what had to be included in  
6 a permit conditions.

7 Or was the regulation establishing  
8 what had to be included a permit. Here we're  
9 arguing about, among things, when can the  
10 agency require a second site-specific risk  
11 assessment.

12 So can you speak to how you see  
13 the two arguments relating here. The  
14 arguments raised in CKRC II pertinent to the  
15 argument that's raised here, which is really  
16 dealing with the factors the agency can  
17 consider when determining whether the RCRA  
18 standard is met.

19 MR. STACHOWIAK: Your Honor, I  
20 think that's a very important point, that  
21 really the questions are different. I agree  
22 with the statement that the CKRC decision in

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1 the first half of it was really focused on  
2 whether or not 270.10(1) set out a standard  
3 for information that satisfies a RCRA 3000 5b.

4 But here you're, again, yes the  
5 question is whether or not under these  
6 circumstances, the reg can support a decision  
7 the revised risk assessment should be required  
8 to adequately inform that permit decision. Is  
9 that, does that answer your question?

10 JUDGE FRASER: Yes, to a certain  
11 extent. I guess, and you did answer that  
12 question. I'm still going back to the changes  
13 in science and when would you say changes in  
14 science would not be something that would not  
15 trigger a second site-specific risk  
16 assessment.

17 MR. STACHOWIAK: So, because the  
18 evaluation of 270.10(1) is always a fact  
19 specific one and the petitioners can challenge  
20 the facts that support a region's decision to  
21 require a revised risk assessment.

22 So hypothetically let's say, if a

1 permittee does a risk assessment and then only  
2 a few months later the region comes back and  
3 says we're going to reopen your permit.

4 You have to do a further risk  
5 assessment, and they explain why. So akin to  
6 signing letters, akin to a letter like what  
7 the regional permit writer gave.

8 In that case the permittee could  
9 say look it region. You have cited no new  
10 information that's not already covered by my  
11 existing risk assessment. There's no reason  
12 for me to do a revised risk assessment here.

13 And so that would be the basis for  
14 somebody to say that there's been no change in  
15 the science such that a revised risk  
16 assessment is improper.

17 JUDGE FRASER: Okay.

18 MR. STACHOWIAK: Turning to the  
19 interpretive question, EPA's decision to  
20 assess the risks associated with dry  
21 deposition of mercury is fully consistent with  
22 the regulation's plain text.

1                   The       regulation       explicitly  
2 authorizes the permitting authority to acquire  
3 a risk assessment whenever the agency  
4 determines that the MACT standards may not be  
5 sufficiently protective.

6                   This determination is to be made  
7 after considering factors relevant to the  
8 potential risks from enhancer's mixed  
9 combustion unit, including as appropriate, one  
10 or more of the nine factors listed.

11                   The regulation simply does not  
12 state that EPA can only require a revised risk  
13 assessment when facility or site conditions  
14 have changed.       Examining Factor 8  
15 specifically, this factor really provides  
16 little if any support for petitioner's claim.

17                   It is only possible to read this  
18 one subparagraph, as they do, if you look at  
19 it in isolation.    And I explained at the  
20 beginning why doing that misses the forest for  
21 the trees and creates an artificial ceiling on  
22 evaluating risks at site.

1           But even if we focus on that  
2 factor alone, their reading is certainly not  
3 compelled.

4           JUDGE FRASER:    Does Section 8  
5 allow the agency to correct mistakes in a  
6 prior risk assessment?

7           MR. STACHOWIAK:  Yes, and because  
8 it requires the agency to examine the adequacy  
9 of any preexisting risk assessment.  So under  
10 petitioner's reading, they don't give any real  
11 meaning to that phrase, the beginning half of  
12 the factor, which is the adequacy of any  
13 preexisting risk assessment.

14           Instead it,    their    reading  
15 effectively turns only on the second half of  
16 the factor.  And, in fact, they're trying to  
17 rewrite the factor for it to consider the  
18 existence of a preexisting risk assessment  
19 unless there's been changes in facility or  
20 site conditions.

21           Of course this is not how the  
22 factor reads, and then it does not provide

1 strong evidence that it was not intended to be  
2 interpreted that way either.

3 Secondly, I just want to reiterate  
4 that changes in condition likely to affect  
5 risk is not by its terms limited to changes in  
6 facility or site conditions. And that phrase,  
7 "on its terms" can easily encompass changes to  
8 the science as well.

9 Looking at Factor 9, this factor,  
10 too, clearly supports the region's action.  
11 This factor authorizes the permitting  
12 authority to consider other factors as may be  
13 appropriate beyond the first eight.

14 In this case, clearly the risks  
15 associated with dry deposition of mercury are  
16 relevant to the risks from ESSROC's combustion  
17 unit as is the absence of any analysis of  
18 those risks whatsoever.

19 Now petitioner claims that Factor  
20 9 can't add anything beyond the first eight,  
21 but that simply cannot be the case because  
22 under that approach, Factor 9 has been drained

1 of all meaning. It is mere --

2 JUDGE MCCABE: But Factor 9 was  
3 not cited by the region in this case.

4 MR. STACHOWIAK: That is true.  
5 I'm addressing it here in order to respond to  
6 the petitioner's briefs.

7 JUDGE MCCABE: Okay. Thank you.

8 MR. STACHOWIAK: But not only does  
9 their interpretation leave Factor 9  
10 surplusage. They don't offer any alternative  
11 explanation for what Factor 9 could mean under  
12 their views.

13 JUDGE MCCABE: Consistent with the  
14 Cement Kiln decision --

15 (Simultaneous speaking)

16 JUDGE MCCABE: -- Recycling  
17 Coalition.

18 MR. STACHOWIAK: I think they  
19 don't offer any, if you take the view that  
20 Factor 9 cannot mean anything beyond the first  
21 eight, then it raises the question of what  
22 does Factor 9 encompass if it has to be

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1 identical with those eight.

2 JUDGE FRASER: But isn't the  
3 petitioner relying on the court statements  
4 that any information under Factor 9 must be  
5 similar in nature to the first eight and that  
6 that catch all has to be understood within the  
7 context of those limitations?

8 And so what meaning would you,  
9 what meaning does the agency give to that  
10 language in the court's decision?

11 JUDGE MCCABE: I also believe that  
12 when the court made that decision they were  
13 specifically citing statements that the agency  
14 had made either in the briefing or at oral  
15 argument in that case. So it's not just the  
16 court saying that. The agency has a record  
17 here, too.

18 MR. STACHOWIAK: We don't disagree  
19 that Factor 9 has to be similar in nature with  
20 the first eight.

21 JUDGE FRASER: Meaning what?

22 MR. STACHOWIAK: Well, so what the

1 court was saying there was that that factor,  
2 like all the others, looks to the questions  
3 based on the words of the reg itself that the  
4 information must be necessary.

5 JUDGE STEIN: Counsel's time's up.

6 MR. STACHOWIAK: May I --

7 JUDGE FRASER: We're okay. Thank  
8 you.

9 MR. STACHOWIAK: -- finish?

10 JUDGE FRASER: Yes.

11 MR. STACHOWIAK: That any factor,  
12 including Factor 9, must be necessary to  
13 determine whether additional controls are  
14 necessary to ensure protection of human health  
15 and the environment right at the beginning of  
16 270.10(1) and be relevant to the potential  
17 risk from a hazardous waste combustion unit in  
18 Paragraph L, 270.10(1)(1).

19 So, in conclusion, EPA's  
20 interpretation of 270.10(1) is reasonable and  
21 consistent with the regulation's plain  
22 language in EPA statements to, in the preamble

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1 and to the D.C. Circuit.

2 Petitioner's suggested alternative  
3 artificially creates an unreasonable ceiling  
4 considering facility risks, and their claims  
5 are essentially repackaged arguments that have  
6 already been twice rejected.

7 JUDGE FRASER: Thank you. Now  
8 hear from regional counsel.

9 MS. ARGENTIERI: Good afternoon.

10 JUDGE FRASER: Good afternoon.  
11 Well, good morning still.

12 MS. ARGENTIERI: As my co-counsel,  
13 Mr. Stachowiak mentioned, my name is Sabrina  
14 Argentieri, and I represent United States  
15 Environmental Protection Agency Region 5. And  
16 I --

17 JUDGE FRASER: Excuse me, Ms.  
18 Argentieri, if you could just lower the mic a  
19 little bit? Thank you.

20 MS. ARGENTIERI: Is that better?

21 JUDGE FRASER: Better.

22 MS. ARGENTIERI: Okay. And I am

1 here to address the third item on your agenda,  
2 namely the ESSROC Cement 2012 Site-Specific  
3 Risk Assessment. And as an initial procedural  
4 matter, I would like to point out an issue  
5 raised by Mr. Schworer regarding the  
6 methylation rate.

7 Mr. Schworer says there are three  
8 issues for the site-specific risk assessment  
9 of 2012 that are at issue in this petition.  
10 One is the bioaccumulation factor. The other  
11 is the fish consumption rate, and then he  
12 mentioned a third, the methylation rate.

13 But even though ESSROC did include  
14 that as a comment to the permit, it did not  
15 include it as an argument in the petition.  
16 And as such, ESSROC should not be able to  
17 raise it now in this petition process.

18 JUDGE FRASER: Ms. Argentieri,  
19 before you get started just some background  
20 information for us. Can you tell us where in  
21 the record the 2003 mercury feed rate limit is  
22 provided?

1 MS. ARGENTIERI: The 2003 mercury  
2 feed rate limit is in the ESSROC, the 2003  
3 permit.

4 JUDGE FRASER: But where is that  
5 in the record for this --

6 MS. ARGENTIERI: Where is that in  
7 the record?

8 JUDGE FRASER: There's a lot of  
9 dispute about how much it has been decreased,  
10 but we didn't have a basis for understanding  
11 what it was initially.

12 MS. ARGENTIERI: The 2003 RCRA  
13 permit is not in the record, Your Honor.

14 JUDGE FRASER: Okay, and what is  
15 the mercury feed rate limit?

16 MS. ARGENTIERI: The 2003 mercury  
17 feed rate limit is --

18 JUDGE MCCABE: Is it a matter of  
19 public record? Is it available on a website  
20 someplace?

21 MS. ARGENTIERI: There is no  
22 mercury feed rate limit in the ESSROC 2003

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1 permit, Your Honor. I beg your forgiveness.  
2 There is no, it was determined that a mercury  
3 feed rate limit was not necessary based upon  
4 the record at the time.

5 JUDGE MCCABE: Okay and where  
6 would we find that? Is it publicly available  
7 anyplace?

8 MS. ARGENTIERI: Is the record  
9 publicly available?

10 JUDGE MCCABE: Yes.

11 MS. ARGENTIERI: I would have to  
12 check and see if the record was available at  
13 the EPA.

14 (Simultaneous speaking)

15 JUDGE MCCABE: Please report back  
16 to the board on that. Okay.

17 MS. ARGENTIERI: The 2003 permit  
18 wasn't an issue in this matter, so we don't  
19 have access to that record at the moment.

20 JUDGE STEIN: So are you saying  
21 that the region didn't rely on the 2003 permit  
22 when it issued the 2008 permit?

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1 MS. ARGENTIERI: The region relied  
2 on the 2013 permit?

3 JUDGE STEIN: I meant the 2013  
4 permit. I'm a little confused because we're  
5 issuing a new permit for this facility. The  
6 old permit is not in the record.

7 I don't know where it's publically  
8 available, but I'm asking whether that, the  
9 region didn't rely on the old permit when it  
10 issued the new permit.

11 MS. ARGENTIERI: Issuing the 2013  
12 ESSROC permit, the region conducted a second  
13 site-specific risk assessment to evaluate  
14 whether the waste combustion MACT, that it was  
15 protective of human health and the  
16 environment.

17 And in conducting that assessment,  
18 that is what the region relied on in issuing  
19 the permit.

20 JUDGE STEIN: So they didn't look  
21 at the old permit?

22 MS. ARGENTIERI: We looked at the

1 old permit to the extent for other variables,  
2 but for the mercury feed rate limit that is in  
3 the 2013 permit, we conducted a subsequent,  
4 second site-specific risk assessment that we  
5 based the permit limit on.

6 JUDGE FRASER: But was mercury  
7 included as part of the assessment in the 2003  
8 assessment?

9 MS. ARGENTIERI: Yes, it was  
10 included. ESSROC conducted a site-specific  
11 risk assessment as part of the 2003 permit  
12 process.

13 JUDGE FRASER: And the region  
14 approved the protocol including the mercury  
15 assessment that ESSROC used in 2003?

16 MS. ARGENTIERI: The region in the  
17 end accepted the analysis that ESSROC had  
18 conducted in conjunction with some, with  
19 revised parameters ESSROC incorporated after  
20 it concluded the 2003 risk assessment.

21 And based upon that analysis  
22 determined that a feed rate, a mercury feed

1 rate limit wasn't necessary.

2 JUDGE FRASER: I'm sorry. I'm  
3 still not following because I thought, and  
4 correct me if I'm wrong, but I thought I  
5 understand from both the region's materials  
6 and the petitioner's materials that in 2003  
7 there had been a discussion between the two  
8 about what the protocol should be for the risk  
9 assessment that the region signed off on that  
10 protocol when ESSROC went forward and did the  
11 2003 risk assessment.

12 Is that correct?

13 MS. ARGENTIERI: As part of, Your  
14 Honor, as part of the process at the end of  
15 the site-specific risk assessment analysis,  
16 the region doesn't officially approve the  
17 analysis. But it does use the results of the  
18 analysis --

19 (Simultaneous speaking)

20 JUDGE FRASER: I'm not asking so  
21 much about the analysis. I'm asking before  
22 they even started the analysis was there a

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1 here's what we plan to do, these five things,  
2 and the region said we agree.

3 Those are the five things you  
4 should do. Then you get the analysis, and I  
5 understand you incorporate the analysis. I'm  
6 really asking about was there a preapproval of  
7 what they were planning to do as part of that  
8 2003 assessment.

9 MS. ARGENTIERI: Well, the, again  
10 because the 2003 risk assessment and the  
11 permit isn't at issue here, I am not  
12 intimately familiar with that process. But  
13 what I am aware of is that ESSROC did conduct  
14 the 2003 site-specific risk assessment.

15 And when it submitted, it  
16 submitted a document from ESSROC's  
17 representative Horizon to the agency asking if  
18 certain parameter values, if used, would  
19 overestimate the hazardous quotient and  
20 therefore the resulting risk.

21 That was submitted to, by the  
22 permitting engineer to one of our risk

1 assessors. And our risk assessor, and again,  
2 this is not part of the record because this  
3 wasn't an issue in the 2013 --

4 (Simultaneous speaking)

5 JUDGE FRASER: Well, here's the  
6 way I'm trying to go. The 2003 permit is  
7 still in effect as I understand it because  
8 you're still debating the 2008 permit.

9 MS. ARGENTIERI: Yes.

10 JUDGE FRASER: And under the 2003  
11 permit there were certain assumptions used for  
12 establishing, among things, the  
13 bioaccumulation factor and those assumptions  
14 were not used when the 2008 risk assessment  
15 was done.

16 And part of what I'm trying to  
17 understand is what was done in 2003, which was  
18 different perhaps than what was done in 2008  
19 and where is the explanation.

20 And what is the basis for the  
21 differences because I think what is at issue  
22 here is petitioner arguing that the region did

1 not apply the right bioaccumulation factors  
2 and methylation rates?

3 And those were different than what  
4 they had applied in 2003. So that's the basis  
5 of my questions about 2003.

6 MS. ARGENTIERI: Yes. Your Honor,  
7 for the 2003 I will wrap that up, the EPA risk  
8 assessor commented on the 2003 risk assessment  
9 by stating that the factors that ESSROC  
10 proposed to use would not overestimate the  
11 hazardous quotient or risk.

12 And the region also recommended  
13 using certain bioaccumulation factors that  
14 were more reflective of the water that was at  
15 issue in the 2003 site-specific risk  
16 assessment, which was the Wabash River.

17 So it suggested that ESSROC, it  
18 was appropriate for ESSROC to use a trophic  
19 level 3 and trophic level 4 river BAF. But  
20 for the 2012 site-specific risk assessment,  
21 excuse me, Your Honor, I just need a little  
22 water.

1                   For the 2012 site-specific risk  
2 assessment, U.S. EPA determined that the media  
3 that posed the greatest risk was in fact the  
4 France Park Lakes and not the Wabash River.

5                   So, and that the 2003 risk  
6 assessment didn't incorporate dry deposition  
7 modeling, which could impact and affect the  
8 analysis of whether the MACT was protective of  
9 human health and the environment.

10                   JUDGE MCCABE: Do you know if the  
11 2003 assessment considered those lakes at all,  
12 the France Park Lakes?

13                   MS. ARGENTIERI: The 2003 risk  
14 assessment did consider France Park Lakes. It  
15 added, it actually up to a certain point  
16 included analysis and determined that the  
17 lakes were contaminated.

18                   But at some point ESSROC  
19 determined, and it's not clear from the  
20 record, that the media focus should be the  
21 Wabash River. And then they turned their  
22 focus to that.

1 JUDGE MCCABE: Did Region 5 make a  
2 mistake in approving this permit in 2003?

3 MS. ARGENTIERI: Well again, I  
4 didn't evaluate the 2003 risk-assessment, but  
5 --

6 JUDGE MCCABE: The result is  
7 dramatically different now that you're telling  
8 us there was no mercury limit at all.

9 MS. ARGENTIERI: I would, for the  
10 bioaccumulation factor, I mean if we break  
11 this down and look at the two variables at  
12 issue in this matter for the risk assessment,  
13 for the bioaccumulation factor, the media  
14 focus at that time was rivers.

15 And they used trophic level 3 and  
16 trophic level 4.

17 JUDGE MCCABE: Why rivers and not  
18 the lakes when there were lakes right nearby  
19 ESSROC?

20 MS. ARGENTIERI: That question, on  
21 the record of the risk assessment itself,  
22 ESSROC did not provide an analysis of what it

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1 chose the Wabash River over the France Park  
2 Lakes.

3 JUDGE MCCABE: And that was the,  
4 what I was trying to understand was, was that,  
5 when they did not provide an explanation but  
6 did the agency approve the use of rivers in  
7 2003. And if so, what was different about  
8 2008 that they thought the other data were  
9 more --

10 MS. ARGENTIERI: As far as I can  
11 tell from what I have seen of 2003 record, EPA  
12 did not question ESSROC's decision to focus on  
13 the Wabash River.

14 In 2012, EPA in conducting its own  
15 risk assessment and evaluating the exposure  
16 scenarios determined that the greatest risk  
17 was presented by the lakes. And therefore,  
18 that's the media we should focus on in 2012.

19 It's, we decided that it's not  
20 appropriate just because the wrong media was  
21 focused on in 2003 that we should perpetuate  
22 that and focus on that, continue to focus on

1 that media when we are under the regulatory  
2 mandate to evaluate whether there's a risk  
3 presented by the hazardous waste in MACT.

4 JUDGE MCCABE: The region went out  
5 to that site to do field work. Is that  
6 correct?

7 MS. ARGENTIERI: The region did  
8 go, the risk assessors did go out, and --

9 JUDGE MCCABE: Did they test the  
10 fish? Did they test the sediments, the water  
11 column at all?

12 MS. ARGENTIERI: No, Your Honor,  
13 they followed the protocol in the hazardous,  
14 the human health risk assessment protocol for  
15 hazardous waste combustors, which provides  
16 default parameters.

17 And the Region 4 bioaccumulation  
18 factor determined that it was appropriate to  
19 rely on the default parameters for lakes  
20 because it was a lake that was a media focus  
21 in this case.

22 JUDGE MCCABE: The result of

1 relying on the default factors here has been  
2 that you concluded that at this site, the  
3 MACT, which applies on a national basis is not  
4 protective. Does that mean the MACT is never  
5 going to be protective when there's nearby  
6 lakes?

7 MS. ARGENTIERI: Excuse me, Your  
8 Honor. Can you repeat the question?

9 JUDGE MCCABE: The region used all  
10 default assumptions when doing the risk  
11 assessment. Is that correct for the BAF, et  
12 cetera?

13 MS. ARGENTIERI: No, not quite,  
14 Your Honor. The region determined that it  
15 would be appropriate to use trophic level 3  
16 BAFs as well as trophic level 4.

17 The HHRAP BAF value is only  
18 trophic level 4. But because of evidence that  
19 there are trophic level 3 fish in the lakes,  
20 the region also used trophic level 3 BAFs in  
21 combination with trophic level 4 BAFs.

22 JUDGE MCCABE: Okay. So coming

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1 back to my question, assuming that there was  
2 another lake that had trophic level 3 and 4  
3 fish in it, whenever a cement kiln is, that's  
4 burning hazardous waste is located near a lake  
5 like that, does that mean the MACT is not  
6 going to be protective?

7 MS. ARGENTIERI: Not necessarily,  
8 Your Honor. An analysis would have to be  
9 done. It's a very complex analysis doing a  
10 site-specific risk assessment. But, Your  
11 Honor --

12 JUDGE FRASER: How would it have  
13 changed if he'd used the default values? What  
14 would be a factor that would cause a different  
15 result on a site-specific basis?

16 JUDGE MCCABE: Don't worry about  
17 that time.

18 MS. ARGENTIERI: Are you, I'm  
19 sorry, Your Honor. Are you asking me if the  
20 --

21 JUDGE FRASER: I think what Judge  
22 McCabe was trying to ask or was asking you was

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1 that you have a MACT standard that's 897  
2 something, and in this case you've done an  
3 analysis using default values and the  
4 guidance.

5 And it resulted in the MACT  
6 standards not being protective enough per the  
7 RCRA standard.

8 Is the region's conclusion, would  
9 that not always be the case if there were  
10 another cement kiln located next to a lake  
11 that had trophic level 3 and 4 fish in it  
12 because they're default values so that there  
13 is not necessarily a site-specific difference  
14 in that case?

15 MS. ARGENTIERI: Well, Your Honor,  
16 there are many variables that go into a risk  
17 assessment analysis. And in this risk  
18 assessment analysis we actually performed the  
19 dry vapor deposition modeling.

20 We did speciation. All those  
21 variables could be different for different  
22 facilities. And they could also have an

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1 impact on the outcome.

2 JUDGE FRASER: Okay.

3 MS. ARGENTIERI: Your Honor, if I  
4 could address an issue that Mr. Schworer  
5 raised about EPA providing the --

6 JUDGE FRASER: Excuse me, just for  
7 the, we have more questions though, so we  
8 appreciate the reminder that they'd run out of  
9 the allocated time. But we'll exercise our  
10 discretion to, but thank you.

11 MS. ARGENTIERI: -- that the  
12 region did not provide ESSROC opportunity to  
13 participate in the site-specific risk  
14 assessment analysis for 2012.

15 And I will say as a professional  
16 matter, not only is this relevant because 124  
17 does not require an opportunity to comment  
18 prior to the comment prior, but ESSROC did not  
19 raise this argument in the, during the comment  
20 period.

21 In fact, it raised it in the reply  
22 to our response in this petition process.

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1 Therefore, the EPA did not include in the  
2 record documents to show that it did involve  
3 ESSROC in the process.

4           However, Your Honor, I can refer  
5 to documents that we do have but weren't put  
6 in the record because we didn't deem them  
7 relevant at the time. And we still argue they  
8 aren't because this issue, we should be  
9 precluded.

10           We have documentation that in May  
11 15, 2009, ESSROC submitted to EPA a memo  
12 proposing that EPA use the trophic level 3 and  
13 trophic level 4 lake values, which are the  
14 values that we used in our 2012 risk  
15 assessment.

16           JUDGE FRASER: I think there's  
17 reference in the record in some of the  
18 pleadings to that.

19           MS. ARGENTIERI: Yes. That  
20 document is.

21           JUDGE FRASER: Right.

22           MS. ARGENTIERI: But the documents

1 that aren't referenced is that again in 2011,  
2 on April 2011, EPA actually provided its  
3 industrial risk assessment protocol model to  
4 ESSROC that included the BAF and the fish  
5 consumption rate we ended up using.

6 And there's also an email from  
7 ESSROC representative Dan Carney dated  
8 September 9, 2011 that referred to the, that  
9 mentions that default consumption, fish  
10 consumption rates and the use of high end  
11 fisher value that EPA used in its assessment.

12 JUDGE FRASER: Those records,  
13 those documents, the email that you're  
14 referencing are in the record. And if I  
15 understand from the region's pleadings, were  
16 not deemed appropriately sufficient in terms  
17 of peer review, that caliber of level.

18 So I think those documentation are  
19 there. It leads me to a question though. Did  
20 the region consider any data from the state or  
21 any other state entity with respect to the  
22 level of fish or fishing use, consumption

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1 rates, thank you, coming from the France Park  
2 Lakes?

3 MS. ARGENTIERI: Well, Your Honor,  
4 the information, the data supplied by ESSROC,  
5 and I use the term data loosely, was, it was  
6 simply statements from random parties.

7 There was an Indiana fish  
8 biologist, but he had never visited the lake.  
9 There were statements that there, the lake  
10 froze over, and therefore limited fishing  
11 during the winter.

12 There were statements of that  
13 nature. ESSROC never linked those statements  
14 to the fish consumption rate that it would  
15 like to use. In fact, this fish consumption  
16 rate it wants to use is actually a fish  
17 consumption advisory for women of child  
18 bearing age.

19 And that is not a fish consumption  
20 rate. It is an advisory. It's a  
21 recommendation. It's not an enforceable  
22 restriction, and it really only applies to

1 women at child bearing age, not men or women  
2 that aren't of child bearing age.

3 And, in fact, Your Honor, there  
4 isn't even a fish consumption advisory for  
5 France Park Lakes.

6 JUDGE FRASER: I'm asking a  
7 question about just the, I'm trying to  
8 understand the region's process. And I  
9 understand you used the default values.

10 I was really trying to understand  
11 did the region, as part of the process, does  
12 the region seek input from the state at any  
13 time, and in this permit in particular, in  
14 looking at what might be fish consumption  
15 rates from lakes that are within the state.

16 MS. ARGENTIERI: Well the region  
17 did do a preliminary search to see if there  
18 was any site-specific data, but it determined  
19 there wasn't any. So it's not part of the  
20 record.

21 The information, though, that  
22 ESSROC provided, the region did analyze in

1 accordance with HHRAP 5.8, which provides how  
2 to do an analysis of whether site-specific  
3 data should be used in lieu of the default  
4 parameters.

5 And we determined that the  
6 information provided by ESSROC didn't rise to  
7 the level or meet the standards of those  
8 requirements.

9 JUDGE FRASER: Okay. Any  
10 questions?

11 JUDGE MCCABE: One more question.  
12 Going back to this dry vapor deposition  
13 scenario, if you know, when did the region  
14 first learn that that exposure pathway was of  
15 potential concern at this site?

16 MS. ARGENTIERI: Well, when the  
17 2005 HHRAP came out, it suggested that, it  
18 recommended that we do dry vapor deposition  
19 modeling. The region determined that they  
20 were near, lakes within 1.6 miles of the stack  
21 and that the source emitted mercury.

22 Therefore, it would be appropriate

1 to conduct dry vapor deposition modeling.

2 JUDGE MCCABE: Did the region  
3 first focus on that at the end that the permit  
4 came up for renewal then and the 2005 HHRAP  
5 was the new scientific evidence that you  
6 needed to be concerned about this?

7 MS. ARGENTIERI: Yes, Your Honor.

8 JUDGE MCCABE: Thank you.

9 JUDGE FRASER: Thank you.

10 MS. ARGENTIERI: Thank you.

11 JUDGE FRASER: Mr. Stoll, we thank  
12 you for your patience.

13 MR. STOLL: Okay.

14 JUDGE FRASER: And we will hear  
15 from the Cement Kiln Recycling Coalition at  
16 this point, and I'm going to shift over a  
17 little bit and watch you on our monitor on the  
18 bench.

19 MR. STOLL: Okay. Thank you. So  
20 at this point, Your Honors, can you see me and  
21 hear me?

22 JUDGE MCCABE: Yes, we can.

1 JUDGE FRASER: Yes.

2 MR. STOLL: Okay. Thank you. I  
3 would like to put a little more context into  
4 what we're talking about, but I do want to get  
5 to fish consumption. And I do want to get to  
6 the point that this mercury feed rate limit is  
7 5 percent of the MACT would allow.

8 And I do want to get to the point  
9 that that's unprecedented for all the site-  
10 specific risk assessments that have been done  
11 for all of our members. And that's probably  
12 why we're here.

13 But the context, I think, is  
14 important. And this is in our amicus brief by  
15 the way. Our amicus brief goes through the  
16 history, and CKRC's had a long history with  
17 hazardous waste combustion.

18 And remember, this all started out  
19 under RCRA. For several years, the only  
20 regulation of hazardous waste combustion by  
21 cement kilns was under RCRA. And then from  
22 RCRA we started to transition to where now the

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1 primary driver is the Clean Air Act.

2 And we've gone with Clean Air Act  
3 MACT standards in two or three phases now.  
4 There's another rule making coming up by the  
5 way because it's under remand right now by the  
6 D.C. Circuit for more MACT standards.

7 And there's been a constant  
8 evolution here where EPA is on record and in  
9 the preambles and everything else where we're  
10 headed down the road towards more Clean Air  
11 Act and less RCRA.

12 In fact, EPA came close to saying  
13 and agreeing with us at one point that you  
14 shouldn't even have to do site-specific risk  
15 assessments under RCRA anymore because the  
16 MACT standards are generally protective.

17 But they didn't quite let go.  
18 Okay. And if you go back to the preambles of  
19 2005 and the preambles that we site on our  
20 briefs, it's like we're not quite letting go.

21 Maybe everyone has to have one,  
22 but hardly anybody should have to have another

1 one.

2 And one thing that I think is  
3 missing from the general counsel's argument  
4 awhile ago when he was citing things from the  
5 preambles and so forth, is he forgot to cite  
6 the fact, and it's in our brief, that time and  
7 time again, throughout those preambles and the  
8 response to comments documents, EPA is saying  
9 that hardly anybody should have to do a second  
10 one.

11 Okay? That should be rare indeed.  
12 And then you have your factors and the, time  
13 and time again by the way, every example that  
14 EPA ever gave of what Number 8 meant was  
15 changes in conditions, receptors and  
16 conditions.

17 That's every example they ever  
18 gave. Now, the question of what if there's a  
19 new pollutant. Well, that's not our case.  
20 What if it was a mistake? I don't think a  
21 mistake is our case. I think what happened  
22 here is --

1 JUDGE FRASER: Mr. Stoll, just a  
2 couple of questions. Yes, the new pollutant  
3 is not your case, but you're asking us to  
4 interpret a regulation that, an interpretation  
5 that we give here could have applicability to  
6 if there is a new pollutant.

7 And so I would like you to address  
8 how you would see if we can't require a site-  
9 specific risk assessment in that instance, or  
10 if we could require it in that instance, what  
11 would be different about that case versus this  
12 one.

13 And so that is, I think, the  
14 relevant question when you're asking us to  
15 apply the regulation in a way and give it the  
16 interpretation you're arguing.

17 MR. STOLL: Yes. I would think  
18 maybe there's room there. We can see. Maybe  
19 there's room. That's not this case, so --

20 (Simultaneous speaking)

21 JUDGE FRASER: Room under which  
22 provision though? Which element of the

1 regulation? If there is room there for the  
2 minute pollutant scenario, under which element  
3 in the regulation 270.10(1) would you see it  
4 falling under?

5 MR. STOLL: Probably eight and  
6 nine, but again I don't think that's our case.  
7 And I want to get into our case because what's  
8 really driving this, and the reason we're  
9 here, by the way the reason we even filed a  
10 brief and I think the reason ESSROC is here is  
11 because this feed rate limit is so low.

12 It's so much lower than has ever  
13 been required in any other cement kiln burning  
14 hazardous waste.

15 And the reason it's so low, I  
16 believe, and somebody can correct me, is  
17 because of the default approach and because  
18 the default approach particularly on fish  
19 consumption and what we're talking about here  
20 is a wholly unrealistic assumption.

21 It's not site-specific. There is  
22 no person who's out there getting all those

1 fish out of that one lake and eating all those  
2 fish for 30 years. That is absolutely  
3 preposterous.

4 So what we believe, frankly, if we  
5 put our arguments together, if this just gets  
6 affirmed, what we believe is the 7th Circuit  
7 would have no probably finding this just a  
8 total failure of reasoned decision making.

9 What you're supposed to do is do a  
10 site-specific risk assessment. And, by the  
11 way, the default factors don't even come from  
12 the statute. They don't even come from a  
13 regulation.

14 They come from guidance. So  
15 again, there's no real legal, there's no legal  
16 foundation for these so-called default  
17 factors.

18 (Simultaneous speaking)

19 JUDGE FRASER: But doesn't the  
20 guidance provide that you can use the default  
21 factors under the word default, and that if  
22 you want to not use them, there is a process

1 and there's a level of specificity or detail  
2 or the type of information that needs to be  
3 provided to overturn that.

4 And the region's argument is that  
5 while petitioner provided certain information,  
6 it didn't meet the level of depth or  
7 robustness that is required by the guidance  
8 for them not to use the default values.

9 So how would you say the board  
10 should not rely on the region's technical  
11 judgement in that instance?

12 MR. STOLL: Well, EPA has said it  
13 over and over again is that the guidance isn't  
14 binding. It's not law. It's not a  
15 regulation. It's merely guidance. And again,  
16 I think the 7th Circuit would view it that  
17 way, too. I think that the --

18 JUDGE FRASER: I agree. It's not  
19 guidance, but I'm trying to --

20 JUDGE STEIN: Not regulation.

21 JUDGE FRASER: I'm sorry. It's  
22 not binding regulation, and it is only

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1 guidance.

2 My question to you is if the  
3 region's response is we were amenable to not  
4 using the default values had we gotten the  
5 type of information the guidance says we  
6 should look at in lieu of those default  
7 values, where in the record and what is the  
8 basis for the board finding that the region  
9 was arbitrary and capricious in its  
10 conclusions in this instance?

11 MR. STOLL: I think if we look  
12 throughout the country, and I think what's  
13 happened is risk assessors, when the companies  
14 do them or when EPA approves them or when EPA  
15 does them, there's a bit of common sense  
16 thrown in on things like fish consumption.

17 There just is, and that's, again,  
18 how else could we have gotten to this 5  
19 percent number because no other cement kiln  
20 hazardous waste SSRA has ever gone anywhere  
21 near that.

22 Most cement kiln hazardous waste

1 permits are going ahead after SSRA, they're  
2 using the feed rate derived from the MACT  
3 standard, the generally protective MACT  
4 standard.

5 There are a couple that go a  
6 little bit lower, but nothing like this. And  
7 again, we wouldn't be here if we didn't have  
8 this. So --

9 JUDGE MCCABE: So is your primary  
10 problem, excuse me for cutting you off there.  
11 But I'm trying to understand whether your  
12 primary problem is with the default assumption  
13 in the 2005 HHRAP or whether your primary  
14 problem is with the fish consumption scenario?

15 MR. STOLL: I think the primary  
16 problem that I see is that the number that we  
17 finally got here is not based on reality. It  
18 is --

19 JUDGE FRASER: But where did it go  
20 wrong? Where do you see the primary problem?

21 MR. STOLL: The use of a default  
22 number. The primary problem being that there

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1 is, nobody could possibly believe that there's  
2 one man or one woman eating all this fish for  
3 30 years from one lake.

4 JUDGE MCCABE: So you're not  
5 challenging the bioaccumulation factor.  
6 You're challenging the fish consumption.  
7 That's where you think we primarily went wrong  
8 in this?

9 MR. STOLL: Well, we're here as  
10 amicus, okay. So I will let Mr. Schworer talk  
11 about that. But again, I'm frankly, I'm  
12 thinking about how the 7th Circuit would look  
13 at this.

14 Okay. And how I think the 7th  
15 Circuit would look at this is this number is  
16 not based on reality. It's not site-specific,  
17 and anything that the region could defend to  
18 say that we did at this rate is based on  
19 guidance.

20 But when the result gets you where  
21 it is, and then I think also in the 7th  
22 Circuit we could couple the fact that it's a

1 very, very close question as to whether they  
2 could've done a second SSRA anyway.

3 I mean the whole trend and all the  
4 preambles and everything else is you probably  
5 shouldn't have to do a second SSRA. So I know  
6 there may be holes in that.

7 But when you combine that with the  
8 fact that you've got a preposterous number  
9 here that's only based on guidance, then I  
10 think that's a failure of reasoned decision  
11 making. And I think the 7th Circuit would  
12 agree with that.

13 JUDGE MCCABE: What if the mistake  
14 was in 2003 when EPA approved the original  
15 SSRA? What's the remedy for that?

16 MR. STOLL: Well, I don't know  
17 because all I'm focusing on is this 87.91  
18 number right now. If, I think it's in the  
19 record that the facility was willing to accept  
20 a number that was half the MACT rate.

21 But the region wouldn't let them  
22 do that, so I mean again, as amicus we're not

1 here to answer questions like that. I guess  
2 we're just here basically to say that CKRC  
3 always thought that we shouldn't have to do  
4 SSRAs in the first place.

5 But now we've all done them once.  
6 The record's full of statements that you  
7 shouldn't have to do them again. Okay, here's  
8 one again, and here's one that went wrong.  
9 Okay.

10 JUDGE MCCABE: As amicus, you  
11 ought to be able to answer the question of  
12 whether EPA can invoke Section 2701 and what  
13 pick your one, pick your subsection, in order  
14 to correct a mistake. Can you take a position  
15 on whether EPA can correct a mistake or not?

16 MR. STOLL: I won't dispute that.

17 JUDGE MCCABE: Thank you.

18 MR. STOLL: Especially a  
19 significant mistake, yes, a significant  
20 mistake. Yes.

21 JUDGE FRASER: Thank you. Judge  
22 Stein?

1 JUDGE STEIN: Yes, Counsel you've  
2 been telling us that this particular limit is  
3 dramatically different from the other mercury  
4 rate feed limits that are being set around the  
5 country.

6 Can you tell me, if you know, if  
7 there are other facilities that have been  
8 required to undergo a second risk assessment,  
9 or is this the only such case that you're  
10 aware of?

11 MR. STOLL: It's the only case I'm  
12 aware of, and I checked. But I don't have a  
13 definitive answer, but last time I checked  
14 with the association on that, I was told that  
15 they weren't aware of any others.

16 JUDGE FRASER: How many cement  
17 kilns around the U.S. do you --

18 MR. STOLL: There's about 14  
19 facilities now that burn hazardous waste. I  
20 think there are 100, there's over 100  
21 facilities, but only about, I think, 14 now  
22 are burning hazardous waste.

1 JUDGE FRASER: And do you know how  
2 many of those have done an initial SSRA?

3 MR. STOLL: All of them.

4 JUDGE FRASER: All of them, and I  
5 think you're saying this is the first one, in  
6 answer to Judge Stein's question, this is the  
7 first one you're aware of that has undergone  
8 a second SSRA?

9 MR. STOLL: Yes. It's the first  
10 one I'm aware of, and again, my understanding  
11 is that almost all of them, after SSRA, go  
12 ahead and get the, they get the feed rate  
13 derived from the MACT standard.

14 There's been a couple of minor  
15 exceptions, and in one situation in Kansas the  
16 result was that the facility had to do some  
17 more studies, but didn't get a different feed  
18 rate.

19 JUDGE FRASER: Okay, so I'm sorry.  
20 So just want to make sure I understand. So  
21 out of the 14, not counting ESSROC, so 13 of  
22 the 14 have a mercury feed rate equal to the

1 MACT standard is your understanding?

2 MR. STOLL: I understand there's a  
3 couple that went down maybe 15 or 20 percent  
4 lower.

5 JUDGE FRASER: Okay.

6 MR. STOLL: But not, yes. In  
7 other words, at the rate of 75 percent or 80  
8 percent, but not 5 percent.

9 JUDGE STEIN: But I'm curious  
10 about --

11 MR. STOLL: Nothing. Yes.

12 JUDGE STEIN: Finish I'm sorry.  
13 I'll ask my question after.

14 MR. STOLL: In other words, the 5  
15 percent is just totally out of alignment, and  
16 I'm very comfortable say that.

17 JUDGE STEIN: I'm curious about  
18 the timing of the risk assessments in  
19 relationship to this 2005 guidance that the  
20 region describes as the triggering event for  
21 looking at dry deposition.

22 And I'm curious both because

1 supposedly there is no mercury feed rate limit  
2 in the 2003 permit, if I understand correctly.

3 And yet, you're telling me that  
4 most people have only done a site-specific  
5 risk assessment, whether the time at which  
6 these other risk assessments were done, might  
7 it all be error on that fact.

8 MR. STOLL: You mean were those  
9 assessments done before 2005, Judge?

10 JUDGE MCCABE: Yes.

11 JUDGE STEIN: Yes.

12 MR. STOLL: Is that the question?

13 JUDGE MCCABE: Yes.

14 MR. STOLL: I think some before  
15 and some after. I'm almost positive there  
16 have been several after.

17 JUDGE MCCABE: And have there been  
18 any new --

19 MR. STOLL: I'd have to go back  
20 and, I can't give you a precise answer on  
21 that.

22 JUDGE MCCABE: If you're almost

1 positive that there were several after, do you  
2 know if in those cases the question was raised  
3 about whether the site-specific risk  
4 assessment that had been done needed to be  
5 revisited in light of the HHRAP guidance?

6 MR. STOLL: I do not, but again, I  
7 don't know any where there's been a second  
8 SSRA for a hazardous waste combustor.

9 JUDGE MCCABE: So it could be that  
10 the permitting authority simply didn't look at  
11 the question?

12 MR. STOLL: It's possible, yes. I  
13 just honestly don't know, Judge.

14 JUDGE STEIN: Is ESSROC an anomaly  
15 in not having a mercury feed rate limit in the  
16 2003 permit? Is this a departure from what  
17 other, what was in other permits at this time?

18 MR. STOLL: I don't know that. I  
19 don't know the question. I don't know the  
20 answer to that question either. I honestly  
21 don't.

22 JUDGE FRASER: Just what question,

1 do you know if any cement kilns were built  
2 after the 2005 MACT standards were promulgated  
3 such that they would, subject to whatever the  
4 MACT standard is for new hazardous waste  
5 combustors?

6 MR. STOLL: No. There is no, I do  
7 know that. There is no hazardous waste  
8 combust or out there right now at cement kiln  
9 that's subject to new source MACTS. I know  
10 that.

11 JUDGE FRASER: Okay. Thank you.

12 MR. STOLL: They're all subject to  
13 existing source.

14 JUDGE FRASER: Thank you, Mr.  
15 Stoll. We appreciate your time.

16 MR. STOLL: Thank you.

17 JUDGE FRASER: Five and five.  
18 Five minutes and five minutes as I understand  
19 it.

20 MR. STACHOWIAK: Thank you. I  
21 just want to make one brief point to respond  
22 to Mr. Stoll's suggestion that what the region

1 here represents a failure of reasoned decision  
2 making, specifically with respect to the  
3 statements in the preambles.

4 I just want to point out that  
5 those statements are entirely consistent with  
6 the plain language of the regulation and what  
7 EPA did in this instance. It really, those  
8 statements are at best marginally relevant to  
9 the question here.

10 At bottom, EPA has never issued a  
11 definitive interpretation that narrows the  
12 regulation to the petitioner's cramped reading  
13 of it. I'm not going to try to go through  
14 every one of these statements.

15 I can provide an example if you  
16 wish, but it's clear that if you look at those  
17 statements in context, EPA is either providing  
18 an example or stating its general expectations  
19 or perhaps reciting the regulatory standard.

20 And petitioners do not cite any  
21 statement that the only circumstances where  
22 revised risk assessment could be required is

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1 where facility or site conditions change,  
2 where changes in the science are irrelevant or  
3 even a statement that says these are all of  
4 the conditions under which a revised risk  
5 assessment would be necessary.

6 Unless the board has any further  
7 questions.

8 JUDGE MCCABE: I have one. The  
9 2005 MACT preamble says that the agency can't  
10 conclude that the mercury limits are  
11 protective "until we conduct a further  
12 assessment after implementing the MACT  
13 standards."

14 Do you know if that was ever done,  
15 and if it hasn't been done, do you know if the  
16 agency's working on it?

17 MR. STACHOWIAK: Are you citing  
18 the discussion on 59511 that was handed out  
19 earlier?

20 JUDGE MCCABE: Let check, 59511?

21 MR. STACHOWIAK: Off the top of my  
22 head, I don't know the answer.

1 JUDGE MCCABE: I might need a pair  
2 of glasses to confirm that, but I think so.  
3 Yes. Thank you.

4 MR. STACHOWIAK: I was just going  
5 to point out that on this statement EPA is  
6 describing its deferral under 1006, and so  
7 there the question is can EPA defer  
8 application of the RCRA standards consistent  
9 with RCRA's protectiveness mandate to the MACT  
10 standard. So there it's a determination for  
11 purposes of that rule making.

12 And so it really goes to what EPA  
13 did in 2005 as opposed to what it's doing in  
14 this case, which is it's looking at the risks  
15 relevant to ESSROC's unit and determining  
16 whether or not, what is necessary to be in  
17 that permit for ESSROC's permit to be  
18 protective of a healthy environment.

19 JUDGE FRASER: I have a follow up  
20 question. How would you respond to Mr.  
21 Stoll's argument that even if you followed the  
22 regulation here, and even if you applied to

1 default values, when you end up with the  
2 result you end up with, that is 5 percent of  
3 the MACT standard, sort of you've passed the  
4 APA arbitrary and capricious test of using  
5 default values that lead to such a result.

6 I think that was, at least as I  
7 understood it, the gist of his argument that  
8 the result is arbitrary and capricious and  
9 requires a further look by the region to get  
10 some site-specific data.

11 MR. STACHOWIAK: The default  
12 values are that, their suggestion, and so the  
13 region is entitled to depart from that  
14 circumstance. I don't know why just because  
15 they ended up relying on those that that  
16 inherently means that there's anything  
17 arbitrary or capricious about that.

18 If you have a suggestion that's  
19 been, I believe the HHRAP guidance was peer  
20 reviewed, that is based on an agency document,  
21 that it's not unreasonable to sort of use that  
22 as the best you got if you don't have anything

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1 better.

2 JUDGE MCCABE: It might not be  
3 unreasonable to rely on a default assumption  
4 until you put three together, and you get a  
5 result that, at least according to the  
6 industry point of view here, is nonsensical in  
7 terms of the bottom line and the assumptions  
8 about who's eating how much fish.

9 MR. STACHOWIAK: But again, if you  
10 don't have any thing else, if that's sort of  
11 the best you got, then that's not an  
12 unreasonable place to depart from in running  
13 your calculations.

14 JUDGE MCCABE: Doesn't it  
15 suggestion that the MACT standard by itself is  
16 simply not protective enough when cement kilns  
17 burning hazardous waste are located near lakes  
18 that people fish out of?

19 MR. STACHOWIAK: Well, whether or  
20 not, the question of the MACT standard and its  
21 protectiveness more generally, that's a  
22 question that could've been raised in 2005.

1           That's not the question here. The  
2 question here is whether or not ESSROC's  
3 permit is protective of human health and the  
4 environment in light of the site-specific risk  
5 assessment that was done for that facility.

6           JUDGE MCCABE: What do you think  
7 the 7th Circuit will think the question is?

8           MR. STACHOWIAK: Well, I think  
9 it's necessarily that because what it is, is  
10 it's appeal from a permit that was issued by  
11 the region. And so that's the set of facts  
12 before the board. And ultimately, if they  
13 appeal, before the 7th Circuit.

14           JUDGE STEIN: But apart from the  
15 legal question, isn't petitioner and amicus  
16 right that whatever limit is set has got to be  
17 based on rational decision making and not be  
18 arbitrary and capricious and wholly apart from  
19 whether they had the authority to do a site-  
20 specific risk assessment.

21           Why wouldn't the 7th Circuit look  
22 at the question of whether the actual limit

1 sat. So far from reality that it is arbitrary  
2 and capricious. I mean it seems to me, that's  
3 well within their purview to look at that  
4 question.

5 MR. STACHOWIAK: I don't dispute  
6 that as an abstract question that inquiry  
7 could be made.

8 JUDGE STEIN: Well, I assumed it  
9 would be more than an inquiry. I assumed that  
10 if what I'm understanding is correct, then  
11 that's sort of the heart of the issue.

12 I mean I hear people spending more  
13 time about that limit than I do on the  
14 authority question. So I, you know, would  
15 suggest that all counsel after this argument,  
16 think hard about whether or not the, the real  
17 dispute here is the authority or the real  
18 dispute here is the limit.

19 MR. STACHOWIAK: So to the extent  
20 that the questions go to, again, towards the  
21 facts that the region was dealing with, you're  
22 right that that's not the authority question.

1           And I'm, I can, I'm in a good  
2 position to answer the questions about the  
3 authority, question on the default stuff, Ms.  
4 Argentieri's going to have more information on  
5 that.

6           But again, the question, yes as  
7 abstract, leave a question. The question is  
8 if it's probably fair game that the agency  
9 needed to support its decisions.

10           But beyond that I think that  
11 that's sort of a fact specific thing. And I  
12 guess I'm probably out of time at this point,  
13 and so she may be, this may be a perfect cue  
14 to --

15           JUDGE FRASER:     I think he's  
16 tossing you.

17           MS. ARGENTIERI:   Yes, pass that  
18 hot potato. Thank you.

19           JUDGE FRASER:   I have an initial  
20 question for you, and I'm sorry. I know  
21 you'll have a response, but I would like to  
22 get an answer to the claim that I think both

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1 the petitioner and Mr. Stoll raised about the  
2 consumption rates and the reasonableness of  
3 the levels that were used going, spanning the  
4 30 years.

5 And again, there was change from  
6 the 2003 subsistence fisher to, and I forget,  
7 a consumer fisher I think you said, in the  
8 2012 risk assessment, which actually was  
9 lower.

10 But I'd like to get your response  
11 to their argument that people aren't, and you  
12 said you had people who visited the lake as  
13 part of the analysis, that people just aren't  
14 using the lakes for that level of fishing.

15 MS. ARGENTIERI: Well, first of  
16 all, Your Honor, to address the issue about  
17 the reasonableness of the region's choice to  
18 use the default HHRAP recommended fish  
19 consumption rate.

20 The default value in HHRAP for  
21 fish consumption most closely represents the  
22 receptor at issue in the 2012 risk assessment,

1 which is namely the average of people who  
2 catch fish locally and eat some of the fish  
3 they catch.

4 It is not as ESSROC has portrayed  
5 it, a high end user number. It is a mean  
6 average based upon the USDA National Food  
7 Consumption Survey and the EPA peer reviewed  
8 Exposure Factor Handbook.

9 It's the mean average of low end  
10 fishers to high end fishers averaged, so it's  
11 not a representative of necessarily high end  
12 or low end. It is the average and is not  
13 reflective of subsistence type fishers.

14 The, as I mentioned, the Exposure  
15 Factor Handbook and the USDA National Food  
16 Consumption Survey support the use of this  
17 factor.

18 And pursuant to HHRAP, HHRAP said,  
19 recommends that we use the default parameters  
20 unless there's appropriate and available site-  
21 specific data. EPA determined that there was  
22 not appropriate and available site-specific

1 data reflecting the fish consumption rate.

2 ESSROC suggested that we use the  
3 fish consumption advisory as mentioned  
4 previously in lieu of the fish consumption  
5 default rate in the 2012 risk assessment.

6 However, ESSROC did not provide  
7 any data to support and link the rational  
8 connection between what it says is information  
9 that supports the use of a lower fish  
10 consumption rate.

11 It didn't provide that data, and  
12 according to the HHRAP guidance in Chapter 1  
13 for risk management, which HHRAP does profess  
14 it's not a risk management tool.

15 However, it does outline a process  
16 if a unacceptable risk is determined, unlike  
17 what ESSROC and Mr. Stoll are proffering that  
18 it's mandatory that U.S. EPA incorporate site-  
19 specific data.

20 It actually in HHRAP, it suggests  
21 that we can actually decline to issue a  
22 permit. It gives another option of

1 establishing a more protective limit based  
2 upon the default parameters, which we have  
3 done here in part.

4 As I explained, the BAF isn't  
5 solely the default parameter. And the third  
6 is evaluate site-specific data if it is  
7 available and appropriate. And EPA determined  
8 here that there is no available or appropriate  
9 site-specific data.

10 And if I could turn your attention  
11 to Mr. Stoll's statement that it's not  
12 possible for somebody to fish out of these  
13 lakes for 30 years at the fish consumption  
14 rate that EPA has provided.

15 As I've already described, the  
16 fish consumption rate is not representative of  
17 high end subsistence type users. It is an  
18 average.

19 JUDGE MCCABE: Could you remind us  
20 what that average is?

21 MS. ARGENTIERI: I'm sorry.

22 JUDGE MCCABE: Could you remind us

1 what that average is, how many fish meals a  
2 month?

3 MS. ARGENTIERI: The average is,  
4 well, again, the metric of fish meals per  
5 month isn't a quite accurate metric to use in  
6 this situation because we are trying to do as  
7 a risk assessment that's evaluating and coming  
8 up with hazardous quotient, which is based  
9 upon grams per day.

10 Meals per, different people have  
11 different size meals, so it's not really a  
12 technical evaluation. But for the fish  
13 consumption rate, the default is 87.5 grams  
14 per day, which actually equates to about four  
15 ounces or approximately the size of a deck of  
16 cards.

17 So, I mean, it's not an  
18 unreasonable amount. In fact, there are many  
19 people who do eat well over four ounces of  
20 fish in any given meal as represented by the  
21 food consumption survey.

22 JUDGE STEIN: Everyday?

1 MS. ARGENTIERI: I'm sorry.

2 JUDGE STEIN: Everyday?

3 MS. ARGENTIERI: Well, the  
4 everyday is simply to harmonize it with the  
5 way the hazardous quotient is developed, which  
6 is daily. It doesn't mean that somebody has  
7 to eat it everyday.

8 It just means on average that's  
9 what they eat everyday. So somebody, for  
10 instance, could eat two 14 ounce meals a week  
11 and that has been determined by the USDA Food  
12 --

13 JUDGE MCCABE: That's a lot of  
14 fish.

15 MS. ARGENTIERI: I could tell you  
16 stories, USDA Food Consumption Survey that  
17 that is actually the average of what the  
18 people who fish locally and catch fish and eat  
19 some of what they catch. That is the actual  
20 average. So to --

21 JUDGE STEIN: When the region was  
22 setting this feed rate limit, did it look at

1 all at other limits that were set for other  
2 permits of similar facilities or not?

3 MS. ARGENTIERI: No, Your Honor,  
4 we did not. The region determined that the  
5 mandate it was under was to determine whether  
6 the hazardous waste combustor MACT standard  
7 was protective for this facility in the media  
8 focus.

9 So we determined that it was  
10 irrelevant to look at site-specific risk  
11 assessments from other facilities except to  
12 evaluate. We did look at them. In fact, the  
13 2003 ESSROC cites specific risk assessment to  
14 determine that there are other lakes and  
15 rivers in the area that were in fact  
16 contaminated with mercury.

17 And therefore it was appropriate  
18 to use 100 percent infraction of fish, but  
19 that was only to the extent that it could  
20 inform on the facts at issue in the 2012 risk  
21 assessment.

22 JUDGE STEIN: Thank you.

1 JUDGE MCCABE: One more question  
2 about the SSRAs that the region has required.  
3 Do you know if Region 5 has required any other  
4 SSRAs since the, for cement kilns or other  
5 facilities that are hazardous waste combustors  
6 since the 2005 guidance came out.

7 MS. ARGENTIERI: Again, this is  
8 not part of the record because it was not  
9 brought up as an issue. We did think that  
10 this was irrelevant.

11 However, I know that we are in the  
12 process of conducting a site-specific risk  
13 assessment for Veolia Environmental Services,  
14 which is a hazardous waste incinerator. And  
15 we are also, Region 5 is doing a second site-  
16 specific risk assessment on a facility owned  
17 by Lone Star.

18 JUDGE MCCABE: So no others have  
19 been completed, however.

20 MS. ARGENTIERI: Not completed as  
21 of yet within Region 5. I am not aware of  
22 what other regions are doing.

1 JUDGE FRASER: Thank you. Mr.  
2 Schworer.

3 MR. SCHWORER: Thank you, Your  
4 Honors. Just a few comments in the interest  
5 of time. With regards to the risk assessment  
6 and Factor 8, I would direct you to 70-FR-  
7 59507 Column 2.

8 It reads in relevant part, and  
9 this is response to comments, "also we  
10 maintain our assumption that site-specific  
11 risk assessments generally represent a one-  
12 time cost unless a facility significantly  
13 changes its operations or if receptors  
14 change."

15 JUDGE STEIN: Could a receptor  
16 change by virtue of not having been looked at  
17 earlier, and therefore it's a change simply  
18 because an earlier assessment didn't focus on  
19 it and now it does?

20 MR. SCHWORER: I think at this  
21 point we'd call that a mistake, that the  
22 change in receptor would be, for example, if

1 a new school were to be built in proximity of  
2 the kiln.

3 JUDGE STEIN: But is it a mistake  
4 if the information that focuses permit writers  
5 on a particular pathway comes out after the  
6 initial site-specific risk assessment and  
7 after the initial permit?

8 In other words, people are looking  
9 at data. I mean how is that a mistake. I  
10 mean you still have the receptor. You still  
11 have lakes. You still have a concern about  
12 mercury.

13 And why is that not, in a sense,  
14 whether you call it a mistake or you call it  
15 a change, isn't it the same from an  
16 environmental perspective?

17 MR. SCHWORER: Can I answer that  
18 in the context of the 2003 risk assessment,  
19 which is not in the record? The 2003 risk  
20 assessment is not in the record.

21 And to address the specific  
22 comment, I don't think the region made a

1 mistake when it issued the permit following  
2 the 2003 risk assessment. I think the mistake  
3 here is in the region not following through  
4 with the risk assessment that it undertook in  
5 2012.

6 And if the region were to fully  
7 evaluate the default figures for fish  
8 consumption, methylation rate, bioaccumulation  
9 factor, I would submit that we're going to  
10 come up with a wholly different risk  
11 assessment.

12 Remember risk assessments are  
13 averages. You're averaging hundreds of  
14 variables, air dispersion modeling, fish  
15 consumption rates. The variables within a  
16 risk assessment are myriad.

17 And the guidance from HHRAP, Page  
18 7-10 of HHRAP says that "the issue of target  
19 risk levels," which is here the target risk  
20 level for mercury is 0.25 for hazard quotient.

21 It says, "For that target, a risk  
22 assessment that exceeds these targets,

1           however, would not in and of itself  
2           necessarily indicate that the proposed action  
3           is not safe or that it presents an  
4           unacceptable risk.

5                         Rather, a risk assessment that  
6           exceeds the target value," which the regions  
7           2012 risk assessment showed an exceedance of  
8           the mercury target values for the fisher child  
9           and fisher adults.

10                        "If the risk assessment exceeds  
11           that target value, further careful  
12           consideration of the underlying scientific  
13           basis for the calculation is what's in order."

14                        So the purpose of the risk  
15           assessment in this, again, in the uncertainty  
16           determination is to identify your own  
17           uncertainties and then, in effect, drive those  
18           uncertainties down to a point where you've got  
19           the best estimate you have.

20                        So in this situation, what would  
21           that possibly entail? Before I go to that,  
22           the comment with regards to the information

1 was not available to the region.

2 That goes to the point of the  
3 region undertook this risk assessment, so the  
4 region stepped into the shoes of the YOU, the  
5 Y-O-U that is in the HHRAP guidance.

6 And in doing that, the YOU has a  
7 responsibility to determine the information to  
8 drive those uncertainties down. So in this  
9 situation, it was the region's responsibility  
10 to determine is that the right fish  
11 consumption rate for those lakes.

12 Now one more, and I apologize for  
13 the random comments, but one more comment with  
14 regards to the 2003 risk assessment and the  
15 question about the lakes within that risk  
16 assessment.

17 Now again, the 2003 risk  
18 assessment is not in the record, so the region  
19 did not rely upon the 2003 risk assessment.  
20 Examination of that risk assessment will  
21 likely, and again, I'm not a risk assessment  
22 expert, but the lakes are in there.

1           They are mentioned. What the risk  
2 assessors decided to do was proceed in terms  
3 of the fisher exposure, to talk about the  
4 Wabash River. And I could surmise there's  
5 some reasons that you would do that.

6           More people, they're more likely  
7 to fish in the Wabash River versus these very  
8 small lakes. So to the extent there's concern  
9 that the '03 risk assessment was wrong or  
10 somehow was a mistake, I would submit that  
11 close examination of the actual risk  
12 assessment would be appropriate.

13           And again, just in a comment with  
14 regards to the availability of information.  
15 The time line of the region running the  
16 computer model in May of 2012, and that's in  
17 the record as the screening site assessment  
18 reported in June of 2012.

19           And then in July of 2012 is the  
20 issues of the draft permit, so again, the  
21 proper sequencing under HHRAP would've been  
22 that the model was run in May of 2012.

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1           The region then sees that there's  
2           an unacceptable risk.     The region then  
3           should've followed HHRAP and identified the  
4           risks, the uncertainties, what was driving  
5           that unacceptable figure and then gone out to  
6           develop the data.

7           For example, a fish consumption  
8           study at the lakes.    You spend time asking  
9           people who fishes there.   How often do you  
10          fish there?   There's a question about are  
11          these lakes even sufficiently sustainable to  
12          support the kind of fishing that is estimated  
13          through the default values.

14          Then there's other issues with  
15          regards to the bioaccumulation.   Those are  
16          figures that can be measured in the  
17          environment.   You can go do a bioaccumulation  
18          test at a lake, same with methylation.

19          So again, the timing of May, June,  
20          July is the challenge as to why there's  
21          nothing in the record.   Now, it's the region's  
22          responsibility to do that because the region

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1 conducted the risk assessment.

2 JUDGE FRASER: Does the HHRAP  
3 guidance call for the risk assessor in this  
4 case, you're saying that the region had took  
5 it on to provide a draft risk assessment for  
6 review or just the finalist part of the  
7 permitting record when they issued the draft  
8 permit.

9 MR. SCHWORER: I think that gets  
10 to your question with regards to the 2003 work  
11 when ESSROC and its contractor provided a work  
12 plan to the region, provided draft reports to  
13 the region.

14 And in 2003, they, ESSROC and  
15 Horizon were following the HHRAP guidance  
16 dated 1998 as I recall. So they were  
17 following the HHRAP guidance of the  
18 predecessor of the '05 HHRAP. I would have to  
19 go back and look specifically at the --

20 JUDGE FRASER: We can look. I was  
21 just trying to understand your argument.

22 MR. SCHWORER: I would submit that

1 good practice and fair play in the risk  
2 assessment process would say yes, the preparer  
3 of the document should provide a draft.

4 And again, in this situation where  
5 HHRAP is clear that if you do come up with  
6 that unacceptable risk, it's not game over  
7 move on. It's identify that risk, what's  
8 driving the risk and how do you then develop  
9 site-specific data in lieu of the risk.

10 Another point of clarification.  
11 The 2013 RCRA permit is in effect. The only  
12 provision that's in abeyance is the mercury  
13 feed rate limit.

14 JUDGE MCCABE: So there's no  
15 mercury limit in effect now?

16 MR. SCHWORER: Correct. The  
17 facility is in compliance with HWC MACT.

18 JUDGE FRASER: It's the 2003  
19 permit that's in effect or the 2008 one that's  
20 in effect?

21 MR. SCHWORER: The 2013.

22 JUDGE FRASER: Oh, 2013 permit.

1 I'm sorry.

2 MR. SCHWORER: Yes.

3 JUDGE FRASER: Thank you.

4 MR. SCHWORER: In response to  
5 comments with regards to arbitrary and  
6 capriciousness, with regards to the conduct of  
7 the risk assessment, I think examples of  
8 situations of arbitrary and capricious would  
9 be the 2003 risk assessments not in the  
10 administrative record.

11 The region as the performer of the  
12 risk assessment did not follow HHRAP. For  
13 example, did not drive down into the drivers  
14 of the unacceptable risk.

15 The region simply took the  
16 unacceptable risk and said no more  
17 information. We're finished. The obligation  
18 is to figure out, through the uncertainties  
19 analysis through, and HHRAP goes through a  
20 great discussion of what a conclusion section  
21 should look like in a risk assessment report.

22 And that's where the risk assessor

1 says here's what's driving the risk. Here's  
2 what we've done to identify the factors.  
3 Here's the site-specific information. None of  
4 that exists in the 2012 risk assessment.

5 JUDGE STEIN: Can I ask a question  
6 that builds on a question I think I asked  
7 earlier, which was, was the company offered an  
8 opportunity to conduct the risk assessment  
9 itself? And if so, did the company accept or  
10 decline that opportunity?

11 MR. SCHWORER: I would be happy to  
12 fully explore that question. My, from what  
13 I've seen of the record, the region and ESSROC  
14 had been working together because, for  
15 example, we developed site-specific factors.

16 And then something happened in  
17 2011. And at that point, the region runs the,  
18 and it's the IHAP, I believe, computer model.  
19 And it's in the, the computer print out is in  
20 the record as part of the site screening  
21 report.

22 But they run that model in May of

1 2012. May 28th is coming to mind.

2 JUDGE STEIN: 2012 or 2011?

3 MR. SCHWORER: Now you got me  
4 confused.

5 JUDGE STEIN: Because you  
6 originally said 2011.

7 MR. SCHWORER: 2012.

8 JUDGE STEIN: Okay.

9 MR. SCHWORER: It would've been  
10 the, prior to the issuance of the draft  
11 report, which was in July of 2012, if I'm  
12 correct. But the something that happened was  
13 the lack of communication between the running  
14 of the computer model, the issuance of a  
15 report.

16 Now, interestingly in the record,  
17 there is an indication that a draft report was  
18 circulated internally within the region but  
19 not circulated to ESSROC.

20 JUDGE STEIN: Is it typically for  
21 EPA, well, I should, in the ordinary course,  
22 is it the company that does the site-specific

1 risk assessment, or is there no clear pattern?

2 MR. SCHWORER: This is the first  
3 risk assessment I've seen the region attempt.  
4 Now, I'm sure they do them as back-up to  
5 company risk assessments.

6 JUDGE STEIN: Okay. Thank you.

7 JUDGE FRASER: Thank you very  
8 much, and --

9 MS. ARGENTIERI: I realize that my  
10 time is up, but I'd like to correct a factual  
11 misstatement that was relevant. It has to do  
12 with --

13 JUDGE FRASER: Just hold on a  
14 second. Thank you, Mr. Schworer. We need you  
15 to come to the mic, so we can capture you on  
16 the transcript.

17 MS. ARGENTIERI: I just wanted to  
18 make sure the record accurately reflected that  
19 the 2003 site-specific risk assessment is in  
20 the record at 48-D, title of Comprehensive  
21 Risk Assessment for cement kiln operations of  
22 ESSROC Cement Corporation. The author was

1 Horizon Environmental Corporation.

2 JUDGE FRASER: Great. Thank you  
3 for that correction. I want to thank everyone  
4 and thank the parties in particular and Mr.  
5 Stoll. And this concludes today's oral  
6 argument.

7 (Whereupon, the hearing in the  
8 above-entitled matter was concluded at 12:41  
9 p.m.)

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