United States Environmental Protection Agency: Region 5

Proposed Reopening of Air Pollution Control Title V Permit to Operate
Issued to Veolia ES Technical Solutions, L.L.C., 7 Mobile Avenue, Sauget, Illinois
Permit No. V-IL-1716300103-08-01; Expires October 12, 2013

Docket ID No. U.S. EPA-R05-OAAR-2012-0649

Comments of Veolia ES Technical Solutions, L.L.C.

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Comments of Veolia ES Technical Solutions, L.L.C.

I. Executive Summary

The Veolia ES Technical Solution, L.L.C. ("Veolia") Sauget, Illinois facility exists for one reason—to incinerate waste safely and compliantly. Companies in the commercial hazardous waste incineration industry compete nationwide for business, and each company in the industry is required to hold a Title V operating permit under the Clean Air Act ("CAA"). Through this permit reopening, the United States Environmental Protection Agency ("USEPA" or "Agency") seeks to impose onerous and unfair permit conditions on Veolia—conditions that are being imposed on no other commercial hazardous waste incinerator in the nation—that could force Veolia to shut down one of its three incineration units and would increase Veolia's operating costs to such a level that would jeopardize the economic viability of Veolia's facility.

As summarized immediately below and set forth in detail throughout these comments, USEPA's actions are unconstitutional, unlawful, and, as to Veolia and the proposed significant modification to Veolia's Title V permit ("Draft Permit"), arbitrary and capricious.

- *USEPA Has Exceeded Its Authority to Assure Compliance Under the CAA:* The Agency has exceeded its authority under 42 U.S.C. § 7661c by imposing permit conditions that go beyond what is reasonable and necessary to assure compliance with the CAA. The provisions of Veolia's current permit already ensure compliance with the National Emissions Standards for Hazardous Air Pollutants from Hazardous Waste Combustors ("HWC MACT"), and the proposed additional permit conditions are not authorized.

- *USEPA's Permit Reopening Violates Veolia's Due Process Rights:* The procedures USEPA is following in this permit reopening are constitutionally inadequate as applied to Veolia because they do not give Veolia an adequate opportunity to contest the alleged violations of the Clean Air Act that USEPA is using to justify the reopening.

- *USEPA Is Arbitrarily and Capriciously Using Unsubstantiated Enforcement Allegations to Support the Reopening and Modification of Veolia's Title V Permit:* The Agency is improperly attempting to justify its permitting decision with unsupported and undeveloped enforcement allegations that are not final agency action and have not been subject to administrative or judicial review.

- *USEPA Has Not Act in Good Faith and Failed to Follow Its Own Regulations in Considering Veolia's Application for Significant Modification:* After the issuance of

Veolia's initial Title V permit in 2008, Veolia agreed to submit an application for significant modification that would have made this reopening unnecessary. However, USEPA did not consider Veolia's application in good faith and exceeded the clear non-discretionary deadline for taking final action on Veolia's application for significant modification as set forth in 40 C.F.R. § 71.7(a)(2).

- *USEPA Is Arbitrarily and Capriciously Reopening Veolia's Title V Permit Less Than One Month Before the Permit Renewal Process Must Begin:* All of the proposed permit conditions that USEPA is seeking through this reopening could be fully addressed in the permit renewal process that Veolia must begin on April 12, 2013. USEPA's actions in reopening the existing Title V permit at this late date are unnecessary, a waste of time and resources, and arbitrary and capricious.

- *USEPA Has Arbitrarily and Capriciously Reached Two Different Permitting Decisions Based On the Same Facts:* USEPA was aware of Veolia's location, various Findings of Violation, the variability of Veolia's waste stream, and a 2007 risk assessment report when the Agency decided to issue Veolia's Title V permit in 2008 without the proposed Draft Permit conditions. These underlying facts have not changed and USEPA cannot now use these same facts to justify reopening and modifying Veolia's permit.

- *USEPA Failed to Analyze or Consider the Efficacy of Multi-Metals CEMS:* USEPA failed to independently consider whether a multi-metals continuous emissions monitoring system ("CEMS") could be implemented at Veolia. Rather, the Agency abdicated its obligations to independently verify the effectiveness of new monitoring processes in favor of accepting without question the representations of a monitoring company that has since abandoned the multi-metals CEMS technology.

- *USEPA's Statement of Basis Fails to Provide Rational Evidentiary Support for the Draft Permit Conditions:* USEPA proposes to modify Veolia's Title V permit by requiring the installation of a multi-metals CEMS and imposing new periodic monitoring requirements consisting of supplemental feedstream analysis procedures. However, USEPA's Statement of Basis is vague, contradictory, and fails to adequately justify these requirements.

- *USEPA's Justification for the Multi-Metals CEMS is Implausible and the Agency Has Improperly Modified the Regulatory Process for Alternative Monitoring:* USEPA is arbitrarily and capriciously requiring Veolia to use an unverified means of monitoring– a multi-metals CEMS–to verify that approved means of monitoring—operating parameter limits ("OPLs") and feedstream analysis procedures—a re assuring compliance with the HWC MACT limits. Moreover, USEPA has both misinterpreted and violated the alternative monitoring procedures set forth in 40 C.F.R. § 63.7.

- *USEPA's Statement of Basis is Inconsistent and Vague:* USEPA asserts that a multi-metals CEMS is in fact "the only sure way to verify" Veolia's HWC MACT compliance. If this is true, then USEPA's justifications for the modification of Veolia's OPLs and feedstream analysis plan ("FAP") cannot likewise be true and these permit requirements should be deleted.

- *USEPA's Draft Permit Condition Requiring the Installation of Multi-Metals CEMS Within 180 Days Is Impossible to Meet:* The primary distributor of commercially available multi-metals CEMS has abandoned the technology, and Veolia is aware of no timely means of obtaining multi-metals CEMS from another source. Even if Veolia locates another supplier of multi-metals CEMS, USEPA's 180-day deadline to install, calibrate, maintain and operate the CEMS is impossible to meet.

- *The Administrative Record Demonstrates that USEPA Has Acted with Bias Toward Veolia:* USEPA's submissions to the administrative record show that the Agency's decisionmaking is biased against Veolia. The Agency has improperly included inflammatory statements in documents intended for distribution to the general public, has failed to share important compliance information with Veolia when it was requested, and has failed to independently verify the multi-metals CEMS technology.

- *USEPA's Statement of Basis Does Not Reflect a Fair and Considered Judgment Regarding the Proposed Modifications to the Permit:* The flaws, inconsistencies, and other errors in the Statement of Basis show that USEPA's permitting decision suffers from a lack of reasoned decisionmaking and is arbitrary and capricious. Among other defects, the Statement of Basis sets forth feedrate limits that are inconsistent with the Draft Permit, makes inconsistent statements regarding the existence of environmental justice concerns, fails to provide any explanation for the Draft Permit condition that prevents Veolia from accepting Beryllium-containing waste, and relies upon an inaccurate and unsupported risk assessment.

- *USEPA Should Promulgate a National Standard that Imposes Multi-Metal CEMS On All Hazardous Waste Combustors:* If USEPA believes that the current system that utilizes OPLs and feedstream analysis does not sufficiently assure compliance with the HWC MACT, then the Agency has a duty to the public to promulgate a rule requiring the development of multi-metals CEMS across the entire hazardous waste combustor industry and should not arbitrarily single out Veolia to test this technology for USEPA at Veolia's expense.

In addition, in Part III of these comments, Veolia has set forth the permitting history of Veolia's Sauget facility, because this information demonstrates the arbitrary and capricious nature of USEPA's actions towards Veolia over the past decade-and-a-half. As the history reflects, Veolia is now being asked to pay for the past failures of both state and federal regulators in charge of permitting Veolia's facility.

The Early Years—USEPA and IEPA Neglect Their Permitting Duties

Veolia submitted its first Title V permit application on September 7, 1995 to IEPA, who judged it to be administratively complete the following month. Nearly eight years later, on June 6, 2003, IEPA finally issued a draft Title V permit for public comment and issued a revised draft permit to USEPA on November 6, 2003 for review. Despite the significance of Veolia's Title V permit—the operational compliance guide for its facility for the foreseeable future—USEPA failed to offer any comments on the draft permit. This was a harbinger of things to come, as the permit would not be finalized for another five years.

In December of 2003, Veolia submitted a Comprehensive Performance Test and Continuous Monitoring System Performance Evaluation Test Plan ("2003 CPT Plan") to IEPA and USEPA that requested permission from the agencies to use data from previous expensive stack testing work rather than unnecessarily repeating such testing (so-called "data-in-lieu") and to use extrapolation from this data to set feedrate limits for mercury, semi-volatile metals ("SVM"), and low volatile metals ("LVMs") for the Veolia incinerators. Both of these steps are expressly allowed under 40 C.F.R. § 63.1207(c)(2) (for data-in-lieu), and 40 C.F.R. § 63.1209(n)(2)(vii) and 40 C.F.R. § 63.1209(l)(1)(v) (for LVM/SVM and mercury feedrate extrapolation). Veolia met with IEPA and USEPA multiple times before and after submitting the 2003 CPT Plan to discuss Veolia's use of data-in-lieu and extrapolation. Veolia used data-in-lieu and extrapolation in its Notification of Compliance in 2005, which was shared with regulators. During this period, neither agency ever objected to or even commented on Veolia's use of extrapolation.

The Sierra Club Lawsuits: More Neglect Followed by a Rush to Issue the Permit by the Sierra Club Deadline

The relationship between the agencies and Veolia changed after the Sierra Club filed a lawsuit against USEPA on August 2, 2005 ("First Lawsuit"), seeking to force USEPA to object to the issuance of Veolia's Title V permit. USEPA settled the First Lawsuit with a consent decree and agreed that Veolia's permit would be issued or denied by IEPA within 90 days.

In the immediate aftermath of the First Lawsuit, the agencies objected to Veolia's use of data-in-lieu and extrapolation, even though the regulators had long known that Veolia used data-in-lieu and extrapolation to establish its OPLs. The agencies also forced Veolia to perform complex MACT compliance testing on the Unit 3 incinerator within one month, an extremely short timeframe to obtain the necessary approvals and prepare for such complicated testing. Despite the risks involved in conducting testing in such a shortened timeframe, Veolia demonstrated through the testing that Unit 3 met all applicable HWC MACT standards, including those for mercury, SVMs, and LVMs.

USEPA and IEPA inexplicably failed to make a determination on Veolia's permit within the timeframes they had agreed to in the consent decree, and the Sierra Club sued USEPA yet again in 2006 ("Second Lawsuit"). Ultimately, USEPA settled the Second Lawsuit by agreeing to issue a permit to Veolia within 18 months of receiving a new application from Veolia.

USEPA therefore took direct control over Veolia's Title V permit in September of 2006 and relieved IEPA of its Title V permitting authority for the Veolia facility. USEPA also informed Veolia that—although Veolia had waited since 1995 for a permit determination—Veolia needed to resubmit its application to USEPA.

After USEPA settled the Second Lawsuit with the Sierra Club, USEPA rushed to meet its self-imposed 18-month deadline. However, USEPA simply refused to make decisions relating to Veolia's OPLs for mercury, SVMs, and LVMs. With the deadline looming, USEPA issued Veolia's Title V permit in September of 2008, but left the permit blank with respect to mercury, SVMs, and LVMs. Hence, USEPA appeared to take action—without actually resolving the issues that would draw scrutiny.

USEPA's Arbitrary Activism Towards Veolia

In the years since the Second Lawsuit, USEPA's relationship with Veolia has been marked primarily by USEPA taking action that, while hostile to Veolia, could not be subjected to judicial review without Veolia risking incurring substantial penalties.[1] These actions have included USEPA issuing numerous unsubstantiated FOVs to Veolia. In 2006, and again in 2008 and 2012, USEPA issued FOVs to Veolia that provided no opportunity for judicial review.

Similarly, USEPA began a campaign of issuing long, complex information requests to Veolia. Within a period of 28 months, between 2008 and 2010, Veolia received six such requests, each containing multiple inquiries. Veolia met numerous times with USEPA and was required to respond with lengthy narratives and provide hundreds of pages of documents. Veolia faced daily fines if it did not completely respond to the requests in the short deadlines provided. USEPA acknowledged to Veolia, without apology, that the compliance schedules contained within the requests were unrealistic, performance testing referenced in the requests was inapplicable or nonexistent, and some requests placed the burden on Veolia to create technical standards for equipment that USEPA itself had failed to devise. Veolia was requested to install costly experimental equipment for which no performance specifications had been developed, so that data derived from that equipment could not be relied upon. Further, on at least one occasion, Veolia objected to the timeframe to respond and, in light of potential daily penalties, requested an extension of time. USEPA nevertheless arbitrarily denied the request for extension with no explanation. The information requests, like the FOVs, were not subject to judicial review without Veolia risking daily fines for failing to respond,

USEPA Has Not Acted Rationally Towards Veolia in the Past Seven Years, and This Reopening Is No Exception

USEPA struggles to find a basis for this permit reopening. It references FOVs, the merits of which were never subject to judicial review. The FOVs allege, in part, that Veolia failed to adequately respond to information requests—requests that were also never subject to judicial review. These information requests required Veolia to install experimental technology which, as explained in Veolia's response at the time, (a) did not work, (b) had no performance specifications by which to judge its performance, (c) had been imposed on no other hazardous waste incinerator in the nation, and (d) for which USEPA had promulgated no supporting regulations. When Veolia objected to the installation of such technology based, in part, on the fact that no other incinerator has been subject to a similar requirement, USEPA management told Veolia: "someone has to be first." USEPA also cites to a risk assessment that other regulators have criticized and Veolia has demonstrated to be deeply flawed. Similarly, USEPA references environmental justice concerns as support for the reopening, but USEPA identified no such

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[1] The United States Supreme Court has since recognized that such a situation is untenable and that regulated entities should have access to pre-enforcement judicial review. *See Sackett v. Environmental Prot. Agency*, 132 S. Ct. 1367 (2012).

concerns when it issued Veolia's Title V permit in 2008 and the subject has not changed since 2008.

Moreover, the timing of the reopening is nonsensical. With Veolia's current permit set to expire in six months, USEPA is now hastily pursuing a reopening as opposed to simply placing any proposed requirements in Veolia's renewed permit. Perhaps due to the rush to reopen the permit, the requirements USEPA proposes in the Draft Permit are once again poorly conceived. USEPA proposes that Veolia install a multi-metals CEMS as the only sure way to verify that Veolia's feedstream analysis procedures are sufficient to assure continuous compliance with the HWC MACT limits. However, the record reflects that USEPA has so little knowledge concerning the technology that it must rely on financially-interested third-parties just to describe the CEMS' capabilities. These third-parties clearly misrepresented the state of the technology. Veolia demonstrates in these comments that the multi-metals CEMS has no approved performance specifications by which to judge data produced by it; has never reliably functioned on a daily basis in a commercial hazardous waste environment; and is unavailable because to the primary marketer of the technology (and the primary authority USEPA relied upon for information concerning the technology) recently abandoned it.

The supplemental FAP procedures require sampling in a timeframe that is inconsistent with the timeframe provided for such sampling in Veolia's RCRA permit. The timeframe for sampling proposed by USEPA is the exact timeframe rejected by IEPA due to its concern for workers' safety. Additionally, the plan will require Veolia to test its feedstream multiple times for metals that are known not to be present in the materials tested. This proposed supplemental testing creates additional hazardous waste and subjects Veolia's workers to additional risk due to the potential for releases. Further, the additional sampling of materials when metals are known not to be present will cause Veolia to inaccurately report its emissions under EPCRA—reports that Veolia is required to certify as correct under the penalty of law. This could place Veolia in the untenable position of either having to unethically report erroneous emissions or having to violate EPCRA's reporting requirements.

In the four-and-one-half years since Veolia's permit was issued, USEPA has found reasons to effectively reject every attempt by Veolia to provide the Agency with the OPLs that USEPA chose to leave out of Veolia's permit. USEPA has offered Veolia extrapolation methods which the Agency has approved for use at other companies. However, when Veolia has attempted to utilize those methods, USEPA first refused to "approve or disapprove" and then flatly rejected Veolia's requests. Similarly, USEPA has been present and even taken split samples from metals tests conducted at Veolia. However, when Veolia has attempted to use the results as a basis to establish the metals OPLs, USEPA has rejected Veolia's proposals. Incredibly, even when Veolia suggested that it use USEPA's split sample results as a basis to establish the metals OPLs, USEPA refused to share the analytical results of its split sampling and rejected that request. Now, despite the fact there is only six months left in the permit, USEPA seeks to reopen the permit ostensibly, in part, to fill in these blanks with numbers it derived using "the minimum purity of the original spike material." The irony in USEPA's latest efforts is that while USEPA professes to be concerned about metals emissions, the OPLs proposed by USEPA will raise, not lower, all of Veolia's metals feedrates with the exception of mercury. This is so, in part, because USEPA's own 2007 risk screening found no increased risk for such metals.

USEPA has assured Veolia that it expects to quickly respond to public comments related to the reopening, and that the Agency expects the Environmental Appeals Board ("EAB") to act promptly on any petition filed for review of the permit decision. If USEPA issues the revised permit without modifications and the EAB denies Veolia's petition, Veolia will be forced to implement the Draft Permit's conditions without an opportunity for judicial review. Due to the unreasonableness of the Draft Permit conditions, Veolia could be forced to shut down incineration Unit 3 and lay off workers, or to make a capital investment of over a million dollars to temporarily install a CEMS that will not work and at the end of the period has no secondary resale value. (Further, the installation of the CEMS cannot be accomplished, if ever, in the 180 days provided in the Draft Permit.) Thus, USEPA will irreversibly cause economic harm to Veolia and the surrounding community while avoiding judicial review—just as the Agency did when it issued the FOVs and information requests that the Agency relies upon in this attempt to reopen Veolia's permit.

II. Facility Description

Veolia's facility sits on a 35-acre site, of which 25 acres are used for active hazardous waste management.[2] The facility is located in Sauget, Illinois, near St. Louis, Missouri. Veolia's facility operates two fixed hearth, dual chamber, multi-type feed incinerators referred to as Units 2 and 3, respectively, and one rotary kiln incinerator referred to as Unit 4.[3] Combined, they are capable of totaling 86 million BTU/hr. The facility currently includes 10 container storage units, 2 tank farms, 3 material processing areas and a bulk solids storage building.

III. Chronology/Facts in Support of Comments

As a Hazardous Waste Combustor ("HWC"), Veolia is subject to requirements under both the CAA and RCRA. Under the CAA, Veolia is required to implement Maximum Available Control Technologies ("MACT") to control emissions of hazardous air pollutants from its facility. The regulation implementing these controls is known as the HWC MACT Rule. (The HWC MACT Rule is codified in 40 C.F.R. Part 63, Subpart EEE.) USEPA first promulgated the HWC MACT in 1999. *See* 64 Fed. Reg. 52,828 (Sept. 30, 1999).[4] However, prior to the HWC MACT Rule,

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[2] The Sauget facility was formerly known as Onyx Environmental Services LLC until July 1, 2006, when it changed its name to Veolia ES Technical Solutions, L.L.C.

[3] The facility formerly operated another incinerator, Unit 1, but it was taken out of service and dismantled a number of years ago due to obsolescence and is not a part of the current permitting action.

[4] Though promulgated in September of 1999, the compliance deadline in the original rule was not until September 30, 2003. However, the HWC MACT was vacated by the United States Court of Appeals for the D.C. Circuit in separate rulings in October of 2000 and October of 2001. *See Chemical Manufacturing Ass'n v. EPA*, 217 F.3d 861 (D.C. Cir. 2000) (vacating the "early cessation" NIC and Compliance Progress Report requirements); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (vacating challenged portions of the 1999 HWC MACT because the standards "fail[ed] to reflect the emissions achieved in practice by the best performing sources as required by the Clean Air Act."). The 2001 decision vacated all of the actual emissions standards in the rule, thus, USEPA promulgated interim (temporary) HWC MACT standards in February of 2002. *See* 67 Fed. Reg. 6,792

HWC air emissions were primarily regulated under rules promulgated under RCRA. Generally, RCRA provides for "cradle-to-grave" management of hazardous wastes—from generation to storage to disposal. Because Veolia disposes of hazardous waste by incineration, RCRA controls how wastes at the facility are stored, analyzed, and fed into the incineration units. Upon incineration, wastes are converted into ash, which is regulated under RCRA, or into air emissions, which are regulated by the CAA. Because air emissions are generally controlled by monitoring or restricting how much and what types of waste are fed into the incinerators, there is overlap between the regulatory schemes. Therefore, USEPA promulgated the HWC MACT under the authority of both the CAA and RCRA. 64 Fed. Reg. at 52,991.

The preamble of the HWC MACT Rule expressly dealt with the CAA/RCRA overlap issues in terms of what types of permits a HWC would need after the rule was implemented. 64 Fed. Reg. at 52,974 to 52,991. After considering several approaches, USEPA chose to use the CAA existing Title V operating permit program to implement the HWC MACT air emission requirements. 64 Fed. Reg. at 52,978. This meant that some HWCs would have to apply for Title V permits for the first time, or other facilities, like Veolia, would have to incorporate the MACT requirements into their existing Title V permits or Title V permit applications. The Agency also stated that RCRA permits would still be necessary to address: (1) RCRA specific regulations (not duplicated by the CAA); (2) any risk-based emissions limits and operating parameters as appropriate; and (3) any other RCRA units at the facility (non-air emission units). 64 Fed. Reg. at 52,978. USEPA further explained that:

> The only time we foresee that conditions in both RCRA and Title V permits may govern the same hazardous waste combustor operating parameters and limits is when there is a need to impose more stringent or more extensive risk-based conditions, e.g., under RCRA omnibus authority, to ensure protection of public health and the environment.

64 Fed. Reg. at 52,978. As set forth in more detail in the comments below, the Draft Permit unfairly places Veolia in this exception by attempting to saddle Veolia with onerous and unsupported conditions.

Further, in light of this regulatory background—i.e., the intertwining of the HWC MACT Rule requirements, Title V, and RCRA—it is necessary to first understand Veolia's path through each of these regulatory processes over the past several years in order to properly consider and evaluate Veolia's comments on the Draft Permit. Thus, a chronology of Veolia's compliance with the HWC MACT Rule, Title V, and RCRA is set forth in the sections below.

(Feb. 13, 2002). USEPA also provided certain extensions of the deadlines for compliance. Sources operated under the interim standards until USEPA promulgated the final replacement HWC MACT Rule on October 12, 2005. *See* 70 Fed. Reg. 59,401 (Oct. 12, 2005). The ultimate compliance date under the final replacement HWC MACT Rule was October 14, 2008. *Id.* at 59,412.

A. Relevant Regulatory and Procedural History Concerning Veolia's Title V Permit

1. *1995 through 2003: Initial Title V Application & Test Plans for MACT Compliance*

Veolia submitted its original Title V permit application to IEPA on September 7, 1995. IEPA deemed Veolia's application administratively complete the following month, in October of 1995. Nearly eight years later, on June 6, 2003, IEPA finally issued a draft Title V permit for public comment. The public comment period on this draft permit ended on September 12, 2003, and IEPA sent a revised draft permit to USEPA on November 6, 2003, for review. USEPA did not issue any comments on IEPA's revised draft Title V permit. Harris Aff. at VES 008384.

In December of 2003, in compliance with the interim HWC MACT Rule, Veolia submitted a Comprehensive Performance Test and Continuous Monitoring System Performance Evaluation Test Plan ("2003 CPT Plan") to the IEPA and USEPA. The 2003 CPT Plan outlined the procedures for conducting Comprehensive Performance Tests ("CPTs") on Veolia's three incineration units—Units 2, 3, and 4. In addition to setting forth the CPT parameters for compliance with the HWC MACT, the 2003 CPT Plan included Veolia's proposal to use data-in-lieu and extrapolation of LVM, SVM, and mercury feedrates to establish its OPLs as expressly allowed under 40 C.F.R. § 63.1207(c)(2), for data-in-lieu, and under 40 C.F.R. § 63.1209(n)(2)(vii) and 40 C.F.R. § 63.1209(l)(1)(v) for LVM/SVM and mercury feedrate extrapolation, respectively.[5] Specifically, the 2003 CPT Plan stated that the testing data developed for one of the fixed hearth units would be used to develop OPLs for both incinerators 2 and 3—since Units 2 and 3 are identical incinerators—in lieu of testing both 2 and 3 individually. Veolia stated its intention to use data-in-lieu and extrapolation with the IEPA and USEPA during meetings held with both agencies on January 22, 2003, and April 24, 2003, and neither objected. Harris Aff. at VES 008384-008385.

2. *2004 through 2005: Sierra Club Suit vs. USEPA & Initial MACT Compliance*

On February 18, 2004, the Sierra Club petitioned USEPA,[6] pursuant to Section 505(b)(2) of the CAA and 40 C.F.R. § 70.8(d), to make a decision on Veolia's Title V permit application. USEPA did not respond to the Sierra Club's petition.

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[5] OPLs are limitations on incinerator operating conditions, which include limitations on the amount of certain types of waste that can be fed into the incinerator. They are also referred to as "feedrates." For example, Veolia's OPL—feedrate—for chlorine is 218 lbs/hr for incineration unit 3.

[6] Pursuant to Section 505(b)(2) of the Clean Air Act, a petitioner is required to provide notice to the permittee of challenges under the Section. See 42 U.S.C. § 7661d(b)(2). However, the Sierra Club failed to provide Veolia any notice of its challenge.

On June 30, 2004, Veolia placed a Document of Compliance ("2004 DOC") in its Operating Record establishing its compliance with the HWC MACT Rule. The 2004 DOC also set forth information regarding the use of data-in-lieu and extrapolation to establish the Sauget Facility's OPLs. *See* 2004 DOC at VES 001918-002196.

The Sierra Club, on August 2, 2005, sued USEPA, once again seeking to force USEPA to make a decision on Veolia's Title V permit application. *See Sierra Club, et al. v. Johnson,* Case No. 05-C-4425 (N.D. Ill. Aug. 2, 2005), attached at VES 004597-004628.

On September 28, 2005, Veolia submitted a Notification of Compliance with the HWC MACT Rule ("2005 NOC") for all three incinerators, utilizing data-in-lieu for previous test results on units 2, 3 and 4 and extrapolation to establish OPLs for LVMs, SVMs, and mercury. *See* 2005 NOC at VES 002197-002296. At this point, Veolia had not received any comment from either USEPA or IEPA regarding its submission of the 2003 CPT Plan. Rather, the first time <u>any</u> agency communicated with Veolia regarding the substantive portions of the 2003 CPT Plan was in April of 2006, as discussed below.

3. *2006 through 2007: Sierra Club Sues USEPA Again & USEPA Takes Over the Title V*

On February 1, 2006, pursuant to a consent decree between USEPA and the Sierra Club resolving the Sierra Club's August 2, 2005, lawsuit, USEPA partially granted the Club's petition and directed IEPA to reassess certain aspects of the draft Title V permit for Veolia that IEPA issued in 2003. Further, USEPA directed IEPA to issue a revised permit within 90 days.

On April 5, 2006, Veolia met with IEPA regarding Veolia's pending Title V permit. At that meeting, IEPA stated that Veolia had submitted sufficient information to document MACT compliance for incinerator Units 2 and 4. However, IEPA for the *first* time stated that it disagreed with Veolia's use of data-in-lieu to establish limits regarding incineration Unit 3. In addition, IEPA insisted that Veolia conduct performance testing on Unit 3 as soon as possible. Thus, in May and June of 2006, at significant additional expense due to the short time period allowed for testing by IEPA, Veolia performed MACT compliance testing on Unit 3 individually. Harris Aff. at VES 008385. This testing demonstrated that the unit met all applicable MACT standards, including those for LVMs, SVMs, and mercury. *See* Veolia's June 2006 Test Report for Unit 3 at VES 002297-002441.

IEPA failed to issue a revised Title V permit by the deadline specified in the USEPA/Sierra Club consent decree. In July of 2006, the Sierra Club again filed suit against USEPA in the United States District Court for the Northern District of Illinois in an attempt to force USEPA to issue a revised Title V permit to Veolia. *See Sierra Club, et al. v. Johnson,* Case No. 06-cv-4000 (N.D. Ill. July 27, 2006).

USEPA's answer to the Sierra Club's complaint was due on September 29, 2006. Two days before the answer was due, on September 27, 2006, USEPA issued its first Finding of Violation ("FOV") to Veolia. VES 004670-004679. The September 2006 FOV alleged violations of RCRA and the CAA. Then, on the day the Agency's answer was due, September 29, 2006,

USEPA notified Veolia by letter that USEPA would now be the Agency in charge of issuing Veolia's long-delayed Title V permit. *See* Mem. Op. & Order at 4, ECF No. 29, *Sierra Club, et al. v. Johnson,* Case No. 06-cv-4000 (N.D. Ill. May 21, 2007), attached as VES 004680-004688. USEPA subsequently attempted to dismiss the Sierra Club's claims as moot by arguing that the Agency had taken the action required by the CAA (and sought by the Sierra Club) by taking over the permitting action from IEPA. *See id.* However, the Court denied the Agency's motion to dismiss and ordered USEPA to report to the Court the date by which it would issue or deny Veolia's Title V permit. *Id.* at 9.

On October 23, 2006, Veolia met with USEPA regarding the September 2006 FOV. (The FOV did not require Veolia to submit a response or take other specific corrective action, rather it provided Veolia with an opportunity to meet with USEPA to discuss the allegations.) At the meeting, Veolia provided a significant amount of information specifically disputing the allegations contained in the FOV. At the conclusion of the meeting, USEPA personnel committed to providing a response to the information provided by Veolia. However, USEPA has never provided such a response to Veolia. Harris Aff. at VES 008385.

After taking over the Title V permitting authority, USEPA required Veolia to submit a new application for a Title V permit, including information related to Veolia's compliance with the MACT standards. USEPA set September 29, 2007, as the deadline for that application to be submitted. Harris Aff. at VES 008385-008386. However, in April of 2007 USEPA notified Veolia that it must submit the application by May 2, 2007, effectively shortening the remaining application period to one month. Harris Aff. at VES 008385-008386. Nevertheless, Veolia timely submitted a new Title V permit application on May 2, 2007. The application was deemed administratively complete on June 13, 2007. Harris Aff. at VES 008385-008386.

Subsequently, USEPA entered into a settlement agreement with the Sierra Club. Then, on June 18, 2007, the USEPA filed a notice with the Court stating that the Agency had decided to undertake a *de novo* review of Veolia's Title V permit application and would issue or deny the Title V permit on or before November 2, 2008 (i.e., within 18 months of receiving Veolia's completed application).[7] *See* Notice Re. Federal Title V permit Proceedings at 2, ECF No. 44, *Sierra Club, et al. v. Johnson,* Case No. 06-cv-4000 (N.D. Ill. June 18, 2007), attached as VES 004689-004692.

4. *2008: Performance Testing for Metals & Issuance of Veolia's Title V Permit*

On February 22, 2008, USEPA issued the first of a series of Section 114 information requests to Veolia pertaining to Veolia's compliance with the HWC MACT Rule. *See* February 2008 Information Requests, at VES 002442-002460. Even though Veolia had demonstrated

[7] Since Veolia's application was deemed complete by USEPA in June of 2007, Veolia has paid Title V permit fees to both IEPA and USEPA annually.

compliance with the MACT standards by using data-in-lieu and testing Unit 3 in 2006, the February 2008 Information Requests directed Veolia to submit a new CPT Plan in 45 days and conduct CPTs on all three incinerators by July 15, 2008 (i.e., perform stack testing for all MACT air pollutants by July 15, 2008). *See Id.* at VES 002450. The February 2008 Information Requests specifically prohibited Veolia from requesting to use data-in-lieu methodology under 40 C.F.R. § 63.1207(c)(2). *Id.* at VES 002450.

The February 2008 Information Requests also contained USEPA's first comments to Veolia concerning the 2003 CPT Plan—over four years after Veolia first submitted the Plan to the Agency.[8] Upon receipt of the February 2008 Information Requests, Veolia entered into negotiations with the Agency regarding the infeasibility of completing CPTs on all three incinerators by July 15, 2008.

On March 3, 2008, USEPA sent a letter to Veolia enclosing a "preliminary" draft Title V permit and asking Veolia to submit any informal comments it had on the draft permit by April 15, 2008. *See* Veolia's March 3, 2008 Response at VES 004693-004694. USEPA also stated that it could not calculate OPLs (for mercury, LVMs, and SVMs) to include in the draft permit because of "flaws" the Agency allegedly identified in the data submitted by Veolia. USEPA further stated that these same alleged "flaws" were previously identified by IEPA and that IEPA had shared these with Veolia.

On March 10, 2008, Veolia submitted a formal written response to the February 2008 Information Requests. *See* Veolia's March 10, 2008 Response at VES 004695-004706. In its response, Veolia agreed to conduct the testing requested by USEPA but stated that it could not do so by July 15, 2008. Veolia further supported this assertion by attaching an affidavit from Craig Doolittle of ENSR Corporation (Veolia's stack-testing contractor) that provided that it was infeasible to plan and perform testing that would normally take a year or more, in less than five months.

On March 11, 2008, Veolia responded to USEPA's March 3, 2008, letter regarding the alleged "flaws" in Veolia's data. Veolia stated that IEPA had never advised Veolia of any "flaws" either during meetings held between Veolia and IEPA in April of 2006 or at any other time. Veolia further stated that it continued to believe in the accuracy and integrity of the data provided in support of its Title V application. *See* Veolia's March 11, 2008 Letter at VES 004708-004709.

In a meeting with USEPA on March 13, 2008, Veolia presented its concerns regarding the extremely short time period that it was given to complete the performance testing required by the February 2008 Information Requests. At the meeting, USEPA acknowledged that the schedule included in the February 2008 Information Requests was unrealistic in light of the time needed to plan, prepare, and perform the CPTs. Harris Aff. at VES 008386. Veolia agreed to propose an

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[8] Note that 40 C.F.R. §63.1207(e)(i)(A) directs the USEPA to notify an emission source of its approval or intent to deny a CPT Plan within 9 months of receiving it.

alternative, more practical, schedule and submit it to the USEPA. Veolia's proposed schedule stated that the CPTs would be completed between August of 2008 and April of 2009. *See* Veolia's March 21, 2008 Email (transmitting Veolia's proposed CPT schedules) at VES 004710-004720. However, USEPA rejected the proposed schedule.

After further discussion and investigation by USEPA, Agency personnel decided that they did in fact have valid test data to develop OPLs for all three incinerators for the MACT emission standards for particulate matter ("PM"), HCL/Cl2, dioxins/furans, and DRE but wanted Veolia to conduct performance tests to develop OPLs for mercury, LVMs, and SVMs. In other words, USEPA limited the stack testing to just metals regulated under the HWC MACT Rule. This metals data would then be used by USEPA to issue a revised Title V permit. Veolia again expressed concern regarding the performance of this testing on three incinerators in a very compressed time period.

In an April 25, 2008, telephone conference call, Veolia was informed by USEPA that, in order to address the need to demonstrate compliance with the HWC MACT, Veolia had to choose either to complete the MACT metals testing as directed by the USEPA, pursuant to the Agency's very tight time frame, or alternatively to choose one of four options addressing MACT metals for inclusion in the Title V permit. The four options presented to Veolia were: 1) cease incinerating any wastes containing MACT metals; 2) install CEMS for mercury; 3) accept OPLs developed by USEPA (USEPA Land to assist USEPA Air); or 4) settle previously discussed compliance concerns with issue resolution incorporated into the Title V permit.[9] After negotiations, Veolia—although knowing that conducting performance testing within this expedited time period would be challenging and result in increased costs and, more importantly, increased risk of calculation error as a result of reduced QA/QC review time—chose, with the agreement of USEPA, to conduct the metals performance testing instead of one of the four alternatives presented by the Agency. Veolia agreed to expedite the delivery of the metals performance test plans and USEPA agreed to review the test plans in two weeks. In phone conferences held on May 12 and 14, 2008, the parties discussed details of the testing and USEPA agreed to memorialize the agreement by issuing revised information requests such that Veolia would only be required to perform emission testing for mercury, LVMs, and SVMs ("MACT metals"). Harris Aff. at VES 008386.

Pursuant to this agreement, USEPA issued a revised Section 114 information request on June 5, 2008 (the same day USEPA issued Veolia's draft Title V permit). *See* June 2008 Information Requests at VES 004721-004733. The June 2008 Information Requests required Veolia to, among other things: commence performance testing for LVMs, SVMs, and mercury by no later than August 15, 2008; submit the results of this testing in a Notification of Compliance ("NOC") by September 26, 2008; and submit an application for significant modification to its Title V permit (to include the OPLs for LVMs, SVMs, and mercury developed by the metals testing in the Title V permit) by September 26, 2008. (On or about June 11, 2008, USEPA and the Sierra

[9] The issue resolution proposal related to the allegations of the September 2006 FOV.

Club settled the July 2006 lawsuit with a consent decree that required USEPA to issue a formal permit decision on Veolia's Title V permit by September 12, 2008—thus, Veolia knew that a Title V permit would be issued in September without OPLs for metals and that it would be required to submit an application for significant modification to add the OPLs for metals later.)

On June 12, 2008, USEPA issued a Finding of Violation to Veolia ("June 2008 FOV"). June 2008 FOV at VES 004734-004739. The FOV alleged that Veolia had exceeded its feedrate limits. The Agency also inaccurately alleged that Veolia had failed to request approval of the extrapolation method included in the 2003 CPT plan. The Agency asserted that Veolia had exceeded its feedrate limits because Veolia had operated pursuant to the extrapolated OPLs. However, the FOV did not provide any detail concerning when and how the OPL violations may have occurred or how Veolia had failed to garner the appropriate approval of its extrapolation methodology. Further, the June 2008 FOV did not require Veolia to take any corrective actions or to submit a written response.

A public hearing was held concerning the draft Title V permit on July 8, 2008. Several prominent public figures from across the Southern Illinois region attended the hearing and spoke in support of Veolia's facility. *See generally* June 2008 Public Hearing Transcript at VES 004740-004811.

Veolia was required to submit a performance test plan for USEPA approval prior to performing the metals testing memorialized in the June 2008 Information Requests. The February and June 2008 Information Requests specifically prohibited Veolia from requesting to use data-in-lieu; however, the requests did allow Veolia to request to use an extrapolation methodology to calculate the feedrates for LVMs, SVMs, and mercury. *See* February 2008 Information Requests at VES 002450-002457; June 2008 Information Requests at VES 002481.

Before including an extrapolation method in its metals test plan, Veolia discussed extrapolation methods with Mr. Charles Hall, an environmental engineer, at USEPA Region 5. As a result of these discussions, Mr. Hall provided Veolia with a protocol that USEPA had previously approved for use by Lubrizol Corporation (a corporation also regulated by Region 5) ("Lubrizol Extrapolation Methodology"). Harris Aff. at VES 008387. Veolia incorporated the approved Lubrizol Extrapolation Methodology into the metals test plan that Veolia submitted to USEPA in accordance with the June 2008 Information Requests. *See* Metals Performance Test Plans at VES 002487-002707.

USEPA approved the general parameters of the metals test plan in a letter sent to Veolia dated August 8, 2008. *See* USEPA's Aug. 8, 2008 Letter at VES 002709-002712. However, in response to Veolia's proposal to use the extrapolation method that USEPA Region 5 had previously approved for use by Lubrizol, the Agency stated that it neither "approved nor disapproved" of Veolia's metals feedrate extrapolation. *See id.* at VES 002712. USEPA agreed that, until such time as USEPA did approve metal extrapolation, Veolia could operate at a feedrate no greater than the feedrate used during the actual stack testing. Veolia continues to operate at a feedrate no greater than the feedrate used during the 2008 stack testing.

Veolia proceeded to perform the stack testing for mercury, SVMs, and LVMs in August and September of 2008. USEPA Region 5 personnel were present at each test—except the final run[10] on unit 4, which was observed by IEPA personnel. The final results of the metals tests showed that all three incineration units were in full compliance with the MACT standards for mercury, SVMs, and LVMs.

On September 12, 2008, USEPA formally issued a Title V permit to Veolia (Permit No. V-IL-1716300103-08-01). Veolia's 2008 Title V permit at VES 007297-007507. Veolia's final Title V permit did not contain OPLs for mercury, SVMs, and LVMs.

On September 16, 2008, at Veolia's request, USEPA issued another revised Section 114 information request extending Veolia's deadline to submit the test data, NOC, and its application for significant modification to October 10, 2008. *See* September 2008 Information Requests at VES 002713-002726. The extension provided Veolia with additional time to add information collected during the September portion of the metals testing.

On October 8, 2008, the Sierra Club filed a stipulation dismissing with prejudice the lawsuit that it had filed against USEPA in July of 2006. The basis of the dismissal was that all requirements of the settlement agreement between the Sierra Club and the USEPA had been fulfilled—i.e., USEPA had issued a Title V permit to Veolia.

On October 10, 2008, pursuant to the February, June, and September 2008 Information Requests, Veolia submitted a NOC, the test reports for incinerators 2, 3, and 4, and an application for significant modification to Veolia's Title V permit. *See* Veolia's Oct. 10, 2008 Submission at VES 002727-003877.) In its application for significant modification, Veolia, as required by the Agency, submitted revised OPLs for mercury, SVMs, and LVMs. *See* September 2008 Information Requests at VES 002714-002726.

In addition, pursuant to the USEPA's February, June, and September 2008 revised Information Requests, Veolia also requested permission to use extrapolation methods to calculate feedrates for LVMs, SVMs, and mercury. *See* Feb. 2008 Information Requests at VES 002442-002459; June 2008 Information Requests at VES 004728; Sept. 2008 Information Requests VES 002721. As detailed in its application, Veolia both used the Lubrizol Extrapolation Methodology supplied by USEPA Region 5 and lowered the extrapolated metal feedrates based on historical data as defined in 40 C.F.R. § 63.1209(n)(2)(ii)(B)(2). *See* Veolia's Oct. 2008 Application for Significant Modification at VES 000743-000917.

On October 14, 2008, just four days after Veolia submitted the NOC, the test reports from the August and September metals testing, and its application for significant modification, Veolia placed in its operating record a new DOC ("2008 DOC") to establish its compliance with the

[10] Each metals performance test conducted on one of Veolia's incineration units consisted of three runs.

final HWC MACT Rule.[11] Importantly, Veolia's 2008 DOC contained OPLs for LVMs, SVMs, and mercury that are not based on extrapolation methodology. *See* Veolia's 2008 DOC at VES 003879-004123. Veolia began operating under these OPLs on October 14, 2008, in full compliance with the HWC MACT standards.

Also on October 14, 2008, Veolia submitted a new CPT plan for units 2, 3, and 4. This plan set forth the testing protocols for PM, HCL/Cl2, and dioxins/furans as required by the HWC MACT Rule. Veolia was not required to include MACT metals in this CPT plan.

5. *2009 through 2010: Proposed CEMS and Special Waste Analysis Procedures*

After discussions with USEPA in late 2008, Veolia submitted a revised application for significant modification to USEPA on or about January 6, 2009. This revision lowered (i.e., made the OPLs more restrictive) the feedrates for LVM, SVM, and mercury based on a revised calculation for the moisture content of the solid waste that was fed to the incinerator during the August and September 2008 metals testing. Veolia included in the revised application the Lubrizol Extrapolation Methodology USEPA had provided to Veolia in 2008.

On February 3, 2009, Veolia received another USEPA Section 114 Information Request dated January 29, 2009 ("January 2009 Information Requests"). *See* January 2009 Information Requests at VES 004814-004824. The January 2009 Information Requests directed Veolia to install Continuous Emission Monitoring Systems ("CEMS") for mercury on the three hazardous waste incinerators located at the Sauget facility within 30 days of Veolia's receipt of the requests. The requests also required Veolia to install, evaluate, and certify the mercury CEMS in accordance with an inapplicable Performance Specification (Performance Specification 12) within 30 days after commencing operation of the CEMS. *See* January 2009 Information Requests at VES 004820. The requests also required Veolia to implement "Special Waste Analysis Procedures" that would significantly modify the facility's existing waste analysis protocols under its Waste Analysis Plan ("WAP") (required under RCRA) and Feedstream Analysis Plan ("FAP") (required under the CAA). Among other things, the January 2009 Information Requests required Veolia to analyze all incoming waste for mercury, LVMs, and SVMs within 24 hours of receipt and required more extensive analysis of batches and blends of waste received at the facility. *See* January 2009 Information Requests at VES 004822.

Upon reviewing the January 2009 Information Requests and determining that it would need additional time to fully evaluate the CEMS and the additional analysis requirements, Veolia sought a 60-day extension of time to respond. However, USEPA's assistant regional counsel Sabrina Argentieri summarily denied Veolia's request with no further explanation. Veolia responded to USEPA within the required 30-day timeframe. Veolia's 35-page written response, dated March 4, 2009, ("March 2009 Response") set forth in great detail Veolia's MACT

[11] Veolia was required to comply with the final HWC MACT on or before October 14, 2008. See 40 C.F.R. §§ 63.1200 – 63.1221.

compliance history, Veolia's compliance with the Title V permit program, Veolia's compliance with the RCRA Part B permit program, and specifically responded to each numbered paragraph in Appendices B and C of the January 2009 Information Requests. *See* Veolia's March 2009 Response at VES 001880-001917.

Veolia's March 2009 Response also raised numerous legal, procedural, and technical concerns regarding the provisions of the January 2009 Information Requests. The vast majority of Veolia's concerns were substantive scientific and engineering questions regarding the reliability and accuracy of mercury CEMS. Harris Aff. at VES 008387-008388.

On May 13, 2009, Veolia representatives flew to Chicago to meet with USEPA personnel. The majority of the meeting addressed the technical issues surrounding the installation of mercury CEMS on Veolia's hazardous waste incinerators. USEPA conceded that 30 days had been an insufficient period of time to install the CEMS contemplated by the January 2009 Information Requests. Moreover, the Agency acknowledged that the National Institute of Standards and Technology ("NIST") had yet to come up with a traceable calibration standard that could verify the accuracy of data produced by the proposed mercury CEMS. USEPA also conceded that it had referenced the wrong Performance Specification—Draft PS12—in its information requests and that, to its knowledge, no mercury CEMS had yet been installed and successfully operated at a commercial hazardous waste combustion facility in the United States. Despite these errors and admissions, USEPA indicated that it was not going to withdraw the January 2009 Information Requests and that it intended to use the data collected by the CEMS for compliance with the HWC MACT and possible enforcement. However, the Agency did indicate that it wished to continue the dialogue with Veolia and ended the meeting by stating that Agency personnel would contact Veolia for further discussions—with the eventual goal being some sort of settlement regarding compliance. To date, USEPA has not provided a written response to Veolia's questions or concerns. Harris Aff. at VES 008387-008388.

On or about May 29, 2009, Veolia received another Section Information Request from USEPA ("May 2009 Information Requests"). *See* May 2009 Information Requests at VES 004825-004832. The May 2009 Information Requests sought data on Veolia's 1-minute average mercury feedrates and 12-hour rolling average mercury feedrates, as well as extensive technical information related to the laboratory analysis Veolia performed on samples taken during the 2008 stack testing. Veolia submitted the required information in a response dated July 6, 2009, and supplemented its response by correspondence dated July 28, 2009. *See* Veolia's July 6, 2009 Response at VES 004833-004841 and Veolia's July 28, 2009 Response at 005547-005548. USEPA did not respond to Veolia's submissions. Harris Aff. at VES 008388.

On November 3, 2009, during a conference call with Veolia, USEPA requested that Veolia resubmit its application for significant modification of Veolia's Title V permit with even more restrictive OPLs for LVMs, SVMs, and mercury. In the discussions, USEPA and Veolia agreed that Veolia could use the Lubrizol Extrapolation Methodology it had previously used (and that USEPA had provided in 2008), but that Veolia would limit the extrapolation to a maximum of a low multiple of the performance test feedrates or 75% of the MACT Emission Standard, whichever was less. Harris Aff. at VES 008387.

In December of 2009, Veolia conducted a CPT on units 2, 3, and 4 pursuant to the CPT Plan for PM, HCL/Cl2, and dioxins/furans that Veolia had submitted on October 14, 2008 and USEPA had approved on November 25, 2009. This testing did not include MACT metals.

On February 25, 2010, Veolia submitted its third revised application for significant modification of the Title V permit. This February 2010 significant modification application included OPLs based on a revised extrapolation methodology that was discussed during the November 3, 2009, conference call. However, consistent with USEPA's wishes, Veolia further limited the OPLs to a maximum of three times the amount of LVMs, SVMs, and mercury actually fed into the incinerator during the performance testing. (In light of Veolia's February 2010 revised application, USEPA later requested that Veolia withdraw the October 10, 2008, and January 6, 2009, applications for significant modification. Veolia obliged USEPA via correspondence dated May 12, 2010.) *See* Veolia's May 12, 2010 Letter at VES 000940-000941.

The Agency's next contact with Veolia was the delivery, without prior notification or explanation, of yet another information request under Section 114, dated March 10, 2010 ("March 2010 Information Requests"). March 2010 Information Requests at VES 006357-006368.

The March 2010 Information Requests consisted of a slightly revised version of USEPA's flawed January 2009 Information Requests with a few material changes to the relevant requests. In the March 2010 Information Requests, USEPA attempted to fix the deficiencies that plagued the January 2009 version by impermissibly shifting the burden to Veolia to create technical standards to verify the data generated by the mercury CEMS.

Veolia responded to the March 2010 Information Requests on March 25, 2010. *See* Veolia's March 25, 2010 Response at VES 006346-006468. In addition to numerous general objections, Veolia objected to the Information Requests on the grounds that (a) they were unconstitutional as they placed Veolia in a position of incurring penalties for noncompliance without any opportunity for administrative or judicial review; (b) they represented an attempt by the Agency to unlawfully modify Veolia's Title V permit; (c) they represented an attempt by the Agency to deprive Veolia of its due process rights by circumventing Veolia's appeal of its RCRA Part B Permit; and (d) they were arbitrary and capricious and lacked a rational basis because they ignored Veolia's demonstrated compliance with the HWC MACT Rule. However, despite these objections, Veolia again offered to meet with the Agency in an attempt to work out a compromise.

On April 28, 2010, Veolia sent a team of decision makers to meet with USEPA at USEPA's Raleigh, North Carolina Research Triangle Park facility. At these meetings, the Agency was unable to identify any location where mercury CEMS technology had ever been successfully utilized in the United States on a commercial hazardous waste incinerator. Veolia expressed its belief, based upon Veolia's experience in operating its commercial hazardous waste incinerators, that the high moisture, high temperature environment found in the incinerators and the wide variations of mercury found in the feed combined to make the Veolia incinerators the most challenging environment in which anyone had ever proposed to operate a mercury CEMS. Veolia believed that the technology was likely to fail and would succeed, if ever, only after the mercury CEMS endured many failures and Veolia incurred much time and expense attempting to

force the technology to successfully operate. The Agency did not disagree and offered no evidence to the contrary. As a result of the discussions, the Agency offered to entertain alternative methods to obtain the relevant emissions information. *See* Veolia's May 25, 2010 Letter at VES 006469-006471; Harris Aff. at VES 008388.

In response to USEPA's invitation to offer alternative methods as part of the ongoing discussions between the parties, on May 25, 2010, Veolia offered, in relevant part, to install additional technology in the form of activated carbon injection systems on incinerators 2 and 3, provided that all approvals were in place, to further reduce emissions. *See* Veolia's May 25, 2010 Letter at VES 006469-006471. (Activated carbon injection systems are an effective means of reducing the emissions of mercury and other materials from incinerators.) Veolia further proposed that it would provide the Agency with additional data by scheduling and performing mercury emission testing in accordance with the USEPA approved 2008 performance test plans. This testing would document whether incinerator units 2, 3 and 4 met all applicable mercury MACT Standards. Despite its offer to entertain alternatives to the March 2010 Information Requests, the Agency never provided an analysis or otherwise responded to the merits of Veolia's proposal. Harris Aff. at VES 008388.

Rather, on June 7, 2010, the Agency sent Veolia its sixth information request under Section 114 in 28 months ("June 2010 Information Requests"). June 2010 Information Requests at VES 007572-007579. The June 2010 Information Requests sought data on Veolia's 1-minute average for all metal feedrates, 12-hour rolling average for all metal feedrates, and extensive technical information related to analysis performed on samples conducted on all materials fed into Units 2, 3 and 4 from January 1, 2005 to the date of the June 2010 Information Requests. It also requested information on process upsets, malfunctions, or shutdowns for various timeframes. Veolia submitted the required information in responses dated June 23, 2010, July 7, 2010, July 15, 2010, and July 23, 2010. *See* Veolia's Response to June 2010 Information requests at VES 007508-7517. USEPA did not respond to Veolia's submissions. Harris Aff. at VES 008389.

6. *2011 through 2013: NEIC Inspection & No Progress on Significant Modification*

On December 5, 2011, Veolia was notified by the USEPA National Enforcement Investigation Center ("NEIC") that NEIC inspectors would be conducting a multimedia compliance inspection at Veolia's Sauget facility beginning the next day—on December 6, 2011. *See* NEIC's Dec. 5, 2011 Notice Letter, at VES 006472-006477. From December 6, 2011 until December 15, 2011, the NEIC conducted a multi-media compliance inspection at Veolia's facility. The NEIC inspectors were also accompanied by USEPA Region 5 personnel Shannon Downey, Sarah Marshall, and Jamie Paulin during portions of the visit. NEIC inspectors also requested additional information from Veolia throughout calendar year 2012.

On February 27, 2012, USEPA contacted Veolia to set up a conference call concerning Veolia's application for significant modification of Veolia's Title V permit. Despite the requirements of 40 C.F.R. § 71.7(a)(2), which requires the Agency to respond within 18 months, more than two years had passed since Veolia submitted its February 2010 application for significant modification. A conference call was held between Veolia and USEPA on March 8, 2012.

During the call, USEPA informed Veolia that the Agency was going to deny Veolia's application for significant modification because of the extrapolation methodology that Veolia used—the Lubrizol Extrapolation Methodology that USEPA had provided to Veolia in 2008. Veolia and USEPA then discussed a schedule by which either Veolia would submit additional information, or the Agency would begin actions to formally deny the modification application.

Veolia responded to USEPA by email on March 27, 2012. In that correspondence, Veolia reiterated that it wanted to work with the Agency, but believed that the request by the USEPA to again revise the application—for the *fourth time*—was unreasonable, particularly in light of the fact that Veolia prepared the February 2010 submission in accordance with the agreement reached with USEPA during November of 2009.

Subsequently, at the Agency's request, Veolia submitted even more technical information to USEPA in June 2012, in support of the application for significant modification. *See* Veolia's June 2012 Submission at VES 008284-008287.

On August 27, 2012, Veolia received a Finding of Violation dated August 24, 2012 ("August 2012 FOV") from the Air and Radiation Branch of Region 5. August 2012 FOV at VES 001356-001365. The August 2012 FOV alleged violations based on the March 2010 Information Requests (which restated much of the January 2009 Information Requests) that related to failure to install mercury CEMS, Veolia's OPLs, and the NEIC inspection that had taken place in December of 2011. Portions of the FOV were based on the final inspection report issued by the NEIC; however, USEPA did not provide the report to Veolia.

On September 5, 2012, Veolia submitted its CPT plan to perform stack testing on all three incinerators per the HWC MACT Rule. This submission included planned testing for all hazardous air pollutants regulated under the HWC MACT, including metals (i.e., mercury, LVMs, and SVMs) to take place in August and September of 2013.

Pursuant to the direction of the August 24th FOV, Veolia scheduled a meeting with USEPA to address the FOV's allegations. This meeting was scheduled for September 18, 2012, in USEPA's Chicago office. On September 17, 2012, the day before the scheduled meeting on the August 2012 FOV, USEPA sent Veolia a Notice of Violation, dated September 13, 2012. September 2012 NOV at VES 006478-006481. The September 2012 NOV contained a subset of the same allegations contained with the August 2012 FOV. Harris Aff. at VES 008390.

Veolia representatives met with USEPA on September 18, 2012, in Chicago to discuss both the August 2012 FOV and the September 2012 NOV. During the meeting, Veolia informed USEPA that it could not properly respond to the violations alleged in the FOV and the NOV without receiving a copy of the NEIC Report, which, at the time of the meeting, Veolia had requested but had not received. In addition, based on the information set forth in the FOV and the NOV, Veolia stated that the NEIC Report appeared to contain errors. Sabrina Argentieri requested that Veolia set forth in writing the allegations that Veolia believed to be erroneous, to the extent Veolia could do so without having the benefit of having reviewed the NEIC Report. Harris Aff. at VES 008390. On September 26, 2012, Veolia provided Ms. Argentieri with the requested written analysis. Veolia Sept. 26, 2012 Analysis at VES 006482.

Veolia finally received a copy of the NEIC report on September 28, 2012. The NEIC Report provided context—and further explanation—for USEPA's allegations. Veolia confirmed that the NEIC report contained errors. After having reviewed the NEIC Report, Veolia provided a written response to the allegations via letter dated October 12, 2012. *See* Veolia's Oct. 12, 2012 Response at VES 006483-006502.

Veolia next received an email from George Czerniak, Region 5's Chief of Air Enforcement & Compliance Assurance, on November 29, 2012, informing Veolia that USEPA was about to issue a notice of intent to deny Veolia's application for significant modification of the Title V permit. USEPA Nov. 29, 2012 Email at VES 001679-001680. The email also stated that USEPA intended to formally reopen Veolia's Title V permit to include more stringent OPLs for mercury, supplemental FAP requirements, and require the installation of multi-metals CEMS.

One of the attachments to USEPA's November 29, 2012, email was a "Fact Sheet" which contained numerous inaccurate and derogatory remarks concerning Veolia, including that the Veolia facility was "controversial" and needed "tougher" feedrates. USEPA Nov. Fact Sheet at VES 001844-001846. On November 30, 2013, Doug Harris contacted USEPA and requested that the above statements be removed from the final Fact Sheet or corrected. Harris Aff. at VES 008390-008391. However, even though USEPA agreed to remove those comments, it nevertheless included the draft November Fact Sheet containing the derogatory statements as part of the administrative record available to the public in this reopening. Email attaching draft November Fact Sheet at VES 001679-001846, 001844-001846.

By letter dated December 13, 2012, Veolia responded to George Czerniak's November 29, 2012, email. Veolia Dec. 13, 2012 Email at VES 001850-001853. Veolia explained that it was withdrawing its application for significant modification because the process had taken four years, had not achieved its objective of establishing OPLs for Veolia's existing Title V permit, and was no longer necessary because Veolia's application to renew the Title V permit will be due on April 12, 2013. In addition, Veolia will be performing stack testing on all three incinerators per the HWC MACT Rule (including testing for MACT metals) in August and September of 2013. This testing will provide current and reliable data to establish Veolia's compliance with the HWC MACT, including the establishment of OPLs for mercury, LVMs, and SVMs.

On December 19, 2012, David Ogulei of USEPA sent an email to Doug Harris providing Veolia with an "update" on USEPA's plans concerning Veolia's Title V permit. USEPA Dec. 19, 2012 Email at VES 001857. The email stated that USEPA intended to reopen the permit to include feedrate limits derived from Veolia's 2008 metals testing and that USEPA intended to provide formal notice of the reopening in early 2013.

Finally, on or about January 10, 2013, Veolia received a copy of USEPA's "Notice of Proposed Modification of Veolia's Title V permit" ("Notice of Reopening"), a copy of the Agency's statement of basis for reopening Veolia's permit ("Statement of Basis"), a copy of the draft Title V permit ("Draft Permit"), and copy of the USEPA fact sheet entitled "U.S. EPA Proposes to

Reopen Title V Air Permit" ("Jan. 2013 Fact Sheet"). (USEPA placed copies of these documents in the administrative record for this matter. *See generally* VES 000002-000173. The Draft Permit contains four main changes from Veolia's existing Title V permit: 1) it requires the installation and operation of multi-metals CEMS on Unit 3 for a 12 month period;[12] 2) it includes OPLs (feedrate limits) for mercury, LVMs, and SVMs;[13] 3) it includes supplemental feedstream analysis procedures for mercury, LVMs, and SVMs;[14] and 4) it prohibits Veolia from accepting beryllium containing waste for incineration.[15]

B. Relevant Regulatory and Procedural History Concerning Veolia's RCRA Part B Permit

1. *1997 through 2003: Initial RCRA Part B Permit, Renewal, and Risk Assessment*

Veolia received its initial RCRA Part B permit on March 31, 1988. *See* 1988 RCRA Permit at VES 006711-006858. This initial permit expired on May 5, 1998. Consequently, on November 6, 1997, Veolia submitted an application to IEPA to renew its existing RCRA Part B permit. IEPA deemed Veolia's application administratively complete on April 17, 1998. Approximately five years later, IEPA finally issued a draft RCRA Part B permit for public comment. In 2003, USEPA conducted a RCRA risk screen[16] as part of its review of the draft Veolia permit. Upon completion of the risk screen, USEPA advised Veolia that Veolia's emissions did not pose any risks, and additional risk-assessment was not required. *See* VES 006940.

A public meeting regarding the Part B Permit was held on July 22, 2003. At that meeting, a public commenter suggested that mercury emissions from Veolia may pose a risk to the fisheries

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[12] Based on Draft Permit condition 2.1(D)(1)(i)(iii), the multi-metals CEMS operational period consists of one calendar year beginning from the date of installation. *See* Draft Permit 2.1(D)(1)(i)(iii) at VES 000028.

[13] Veolia is scheduled to undertake CPT testing by September of 2013. As a result, Veolia will be required under 40 C.F.R. § 63.1207(j) to submit a NOC 90 days after the test that will include the most conservative OPLs as between the Title V permit and those derived from the CPT testing.

[14] Because the Statement of Basis justifies a multi-metals CEMs on Unit 3 as "the only sure way to verify that Veolia's feedstream analysis procedures ... are sufficient to assure continuous compliance with the HWC MACT limits," the supplemental feedstream analyses apply only to Unit 3 and only during the 12 month multi-metals CEMS operational period. *See* Statement of Basis at 25 (VES 000163).

[15] Under the current permit, Veolia only accepts non-NESHAP beryllium containing waste.

[16] The purposes of screening level risk assessments are to: 1) estimate the likelihood that a particular risk exists, 2) identify the need for site-specific data collection efforts, or 3) to focus site-specific risk assessments where warranted. *See* Office of Solid Waste & Emergency Response, USEPA, The Role of Screening-Level Risk Assessments (June 2001), attached at VES 006507-006514.

in area lakes that residents allegedly use as a food source.[17] After the public meeting, USEPA revised the risk screen. This revised version of the risk screening was developed in response to the 2003 public meeting and, unlike the earlier risk screening which was conducted prior to the public meeting, this time USEPA identified increased risk.

Veolia submitted its comments on the draft permit on September 17, 2003. Veolia's 2003 Cmts. at VES 006859-006866.

2. *2005 through 2013: Veolia Risk Assessment, Permit Issuance & RCRA Permit Appeal*

In light of USEPA's contradictory risk screenings—the first identifying no risk and the second identifying some risk—Veolia contracted with Franklin Engineering Group (Franklin Engineering) in 2004 to perform a second, independent, risk assessment regarding metals emissions. Franklin Engineering utilized USEPA's Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities[18] to determine that Veolia's low level of metals emissions did not pose a risk to the water bodies in Frank Holten State Park. In November of 2005, Veolia submitted the results of this risk assessment to USEPA. USEPA indicated to Veolia that it would review and comment on the results of the risk assessment conducted by Franklin Engineering within four to six weeks; however, USEPA never responded to Veolia's submission. Harris Aff. at VES 008385.

Rather, USEPA performed yet another risk screening in May 2007. May 2007 Risk Screen at VES 007616-007713. The May 2007 risk screening concluded no additional limits were necessary for dioxins, cadmium, lead, chromium, beryllium and arsenic. *Id.* at VES 007640. The screening found only emissions of mercury from the Veolia facility at the HWC MACT emissions standard would result in potential exposure to methyl mercury above USEPA's risk management guidelines. Therefore, the screening recommended that total annual stack emissions of mercury from the Veolia facility be limited to protect human health.

With regard to finding increased risk due to potential methyl mercury exposure, however, the Agency only reached this conclusion by ignoring evidence and making many assumptions, including that subsistence fishing is conducted at lakes in Frank Holten State Park (a state park and golf course located approximately three miles to the East of the Sauget Facility); that the lakes are closed systems when, in fact, they are connected to the Mississippi River through various canals and ditches which allow fish to travel between the lakes and the River; that fish are native to the lakes when many of the fish most likely to be consumed are stocked; and that

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[17] This statement is included in the transcribed comments from the July 22, 2003 public meeting. *See* July 22, 2003 Public Meeting Transcript at VES 004472-004593.

[18] Franklin Engineering utilized the 1998 Peer Review Draft version of the HHRAP (EPA530-D-98-001) during the initial stages of the risk assessment and then finalized its evaluation using the Final HHRAP (EPA520-R-05-006), which USEPA published in September of 2005.

the trophic level for the fish is 4 which is too conservative and inconsistent with existing evidence. *See generally* VES 006940; DWO at VES 007606-008087. In November 2007, USEPA provided an addendum to the May 2007 Risk Screening which explained how USEPA calculated the conversion of expected emissions of inorganic mercury from the Veolia incinerator stacks to methyl mercury for purposes of assessing potential human health risks, but failed to change any of the unsupported assumptions or the resulting inaccurate conclusions contained in the May 2007 Risk Screening. *See* USEPA Addendum at VES 007714-007760.

On July 24, 2008, over ten years after Veolia submitted its original application for renewal of its RCRA Part B Permit, IEPA issued a second draft permit for public comment ("2008 Draft RCRA Permit"). The 2008 Draft RCRA permit contained many modifications from the draft issued by IEPA in 2003, including stringent requirements regarding mercury. The permit established a "Mercury Annual Feed Rate Limit" for Veolia that stated "[t]he Permittee shall not feed more than a total of 3.63 kilograms (kg) of mercury per year to any combination of the three incineration units." *See* 2008 Draft RCRA Permit at VES 006549. The permit also included requirements that Veolia analyze all incoming waste for mercury within 24 hours of receipt and required more extensive mercury analysis of batches and blends of waste received at the facility. *Id.* at VES 006549-006553. (These later requirements are identical to the ones included in the January 2009 Information Requests and the 2013 Draft Title V Permit that is the subject of this reopening action, except that the January 2009 Information Requests and the 2013 Draft Title V Permit broaden the requirements to mercury, SVMs, and LVMs.)

Veolia submitted its comments on the 2008 Draft RCRA Permit on September 12, 2008. Veolia Sept. 2008 Cmts. at VES 006867-006893. Veolia stated that the new requirements for mercury analysis, recordkeeping and feedrates were "overly onerous, appear punitive, have no regulatory or safety basis and are not consistent with the requirements of the other Region 5 hazardous waste incinerator permits." *See Id.* at VES 006867-006893. Specifically, Veolia noted that the mercury feedrate limit of 3.63 kg/year failed to take into account any removal efficiencies and ignored the results of the risk assessment performed by Franklin Engineering in 2005. Veolia also commented that sampling all waste coming into the facility for mercury within 24 hours was impractical and potentially unsafe. Veolia also added that the increased batch and blend sampling was unnecessary because, if implemented, it would require Veolia to analyze certain wastes a minimum of three times before they could be incinerated.

The 2008 Draft RCRA Permit also set forth a method for calculating the concentration of mercury that Veolia must use in determining its feedrate. Under the method—if Veolia analyzed a waste and could not detect mercury (because the concentration was lower than the instrument could measure)—then Veolia was required to assume that the waste contained mercury at a concentration of ½ of the detection limit.[19] In other words, Veolia would be required to assume that all of its incoming waste contained some mercury (in this case up to ½ of the detection limit

[19] The term "detection limit" generally means the lowest concentration at which an analyte can be accurately detected in a sample.

of the chosen mercury analyzer). Veolia explained in its comments that if it were required to assume ½ the detection limit every time it was required to perform an analysis of waste, then it would nearly exceed the feedrate limit for mercury without ever having actually detected mercury in a sample. Veolia further related that this requirement would artificially inflate the amount of mercury that it was handling at the facility. Veolia's Sept. 2008 Cmts. at VES 006880-006882. (Note: the same method requiring the assumption of the detection limit is included in the 2013 Draft Title V permit, except that it applies to LVMs and SVMs as well as mercury, and it requires Veolia to assume that waste includes the entire detection limit is present in the waste instead of ½ of the detection limit.)

On December 2, 2009, 12 years after Veolia submitted its application for renewal of its RCRA Part B Permit, IEPA issued a final RCRA Part B permit to Veolia ("2009 Final RCRA permit"). *See* 2009 Final RCRA Permit at VES 006711-006858. The final permit contained essentially the same requirements as the 2008 Draft RCRA Permit; specifically, it included all of the stringent mercury analysis requirements that Veolia had commented on in September of 2008.

On January 5, 2010, Veolia appealed the 2009 Final RCRA Permit in its entirety by filing a petition for review with the Illinois Pollution Control Board. Veolia RCRA Appeal at VES 006697-006706. Veolia's appeal is still pending before the Board.

In an effort to settle the RCRA permit appeal, on August 5, 2011, Veolia submitted a "Sampling and Analysis Plan" to IEPA and USEPA proposing a fish and water study of lakes located in Frank Holten State Park that were the focus of the 2003 Risk Screen (and Veolia's follow-up Risk Assessment in 2005). The Sampling and Analysis Plan proposed to collect a sufficient amount of actual quality data regarding the water and fish in the lakes in order to determine the efficacy of the risk studies. Veolia made this proposal in order to provide an analysis based on actual data as opposed to the assumed data USEPA used in its May 2007 Risk Screen. By letter dated September 19, 2011, IEPA provided comments on the Sampling and Analysis Plan. *See* IEPA's Letter at VES 007168-007174. IEPA's September 19th Letter questioned how some of the data would be used to reevaluate the risk assessments but did agree that the sampling could be used to evaluate (and determine) a key assumption of both studies—the assumed trophic level of certain fish (i.e., their position in the food chain) and the resulting bioaccumulation factor ("BAF") assigned to those fish. (BAF is a measure that indicates uptake and retention of certain compounds by organisms.)

In addition, IEPA also responded to Veolia's submissions regarding settlement of the various challenged permit conditions via letter dated September 22, 2011. IEPA indicated that the permit could be changed to clarify some of the disputed requirements, including but not limited to the requirement that all waste must be sampled within 24 hours of receipt for the presence of mercury since "Veolia must never rush to sample a waste where it would cause a safety issue." IEPA's Sept. 22, 2011 Letter at VES 007175-007177, 007176.

On October 4, 2011, Veolia met with personnel from IEPA, the Illinois Attorney General's Office, and USEPA in Springfield, Illinois, to discuss IEPA's comments on the Sampling and Analysis Plan. Although the meeting was set up to discuss IEPA's comments, it was clear to Veolia that USEPA had provided the majority of the comments and analysis of the plan.

Moreover, USEPA personnel led the technical discussion of the meeting concerning the risk studies and their role in supporting the Agency's actions under the HWC MACT Rule. At the conclusion of the meeting, USEPA also, for the first time, verbally shared with Veolia the Agency's calculated mercury removal efficiencies for the three incineration units. This information allowed Veolia to calculate the numerical OPLs (feedrates) for mercury that the Agency believed Veolia should be operating under. (Recall that Veolia had repeatedly requested that USEPA share their calculations and OPLs with Veolia during the Title V permitting process in 2008.) Harris Aff. at VES 008389.

As related above, Veolia has been continually hamstrung in its permitting efforts. In the early years IEPA simply delayed making permitting decisions. Following the series of Sierra Club lawsuits, USEPA was determined to demonstrate activity while simultaneously avoiding taking final agency action. Thus, as demonstrated by Veolia's specific comments below, USEPA's activism has led to a reopening which demands modifications that are unlawful, unsafe, impractical, and nonsensical, and for which there is no rational basis.

IV. Veolia's Comments

A. USEPA Has Exceeded Its Authority to Assure Compliance Under Title V of the Clean Air Act

USEPA states that it is reopening Veolia's Title V permit to "ensure that the permit **assures compliance** with Title V of the Act and its implementing regulations at 40 C.F.R. Part 71, and the National Emissions Standards for Hazardous Air Pollutants (NESHAP) from Hazardous Waste Combustors, 40 C.F.R. Part 63, Subpart EEE." Statement of Basis at 1 (emphasis added)(VES 000139). Specifically, USEPA states that its authority to reopen Veolia's permit comes from 40 C.F.R. § 71.7(f)(iv), which states:

> (f) *Reopening for cause.* (1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:
>
> ....
>
> (iv) The permitting authority (or EPA, in the case of a program delegated pursuant to § 71.10) determines that the permit must be revised or revoked to **assure compliance** with the applicable requirements.

40 C.F.R. § 71.7(f)(iv) (emphasis added). The operable phrase "assure compliance," which is the linchpin of USEPA's authority under Section 71.7(f), comes directly from Title V of the Clean Air Act, specifically, Section 7661c "permit requirements and conditions." *See* 42 U.S.C. §§ 7661c(a), (c). Section 7661c, subsections (a) and (c), state:

> (a) *Conditions*
> Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months,

> the results of any required monitoring, and such other conditions as are **necessary to assure compliance with applicable requirements of this chapter**, including the requirements of the applicable implementation plan.
>
> ....
>
> (c) *Inspection, entry, monitoring, certification, and reporting*
> Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to **assure compliance with the permit terms and conditions**. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section.

Id. By using the phrase "assure compliance" in these two subsections, Congress provided the Agency with authority to: 1) impose permit conditions that ensure that an emissions source complies with the Clean Air Act; and 2) impose monitoring requirements that ensure that an emissions source abides by the permit conditions established by the Agency. However, the express text of Section 7661c also provides ***limits*** to these two areas of authority for USEPA.

Under Subsection (a), Congress chose to qualify the phrase "assure compliance" with the adjective "necessary". *See* § 7661c(a). The adjective "necessary" means something that "cannot be dispensed with; essential; indispensable; as, water is necessary to life." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1200 (2d ed. 1983). Thus, Subsection (a) limits USEPA to requiring only those permit conditions that are essential to ensuring that a source maintains compliance with the Clean Air Act.

USEPA proposes to 1) add specific, USEPA-calculated, OPLs for mercury, SVMs, and LVMs; 2) require the installation of a multi-metals CEMs on Unit 3; and 3) add supplemental feedstream analysis procedures. The Agency states that these modifications are "necessary" to ensuring Veolia's compliance with Title V and the HWC MACT. *See* Statement of Basis at 1 (VES 000139). However, none of these proposals are essential or indispensable to assuring compliance with either Title V or the HWC MACT.

Title V does not impose emissions limitations on Veolia or any other source; rather, Title V sets forth the requirements for operating permits under the CAA. Specifically, the "requirements and conditions" that must be included in a Title V permit are set forth in Section 7661c of the CAA. *See* 42 U.S.C. §§ 7661c. Veolia's current permit, which was issued by USEPA in 2008, contains all of the essential requirements set forth in the statute, including—through incorporation of Veolia's NOCs and DOCs—OPLs for mercury, SVMs, and LVMs. *See* Veolia Title V permit to Operate § 2.1(C)(5). Section 2.1(C)(5) of Veolia's current permit provides that:

> 5. General Operating Requirements [40 C.F.R. 63.1206(c)(1)]
>
> (a) The Permittee **must operate only under the operating requirements specified in the Documentation of Compliance** under 40 C.F.R. § 63.1211(c) **or the Notification of Compliance** under 40 C.F.R. §§ 63.1207(j) and 63.1210(d), except:

(i) During performance tests under approved test plans according to 40 C.F.R. §63.1207(c), (f), and (g), and

(ii) Under the conditions of section 2.1(C)(3)(i) or (ii), above.

(b) Documentation of Compliance. [40 C.F.R. § 1211(c)]

By October 14, 2008, the Permittee must develop and include in the operating record a Documentation of Compliance. The Documentation of Compliance must identify the applicable emission standards under 40 C.F.R. part 63, subpart EEE, and the limits on the operating parameters that will ensure compliance with those emission standards.

(c) Failure to comply with the operating requirements is failure to ensure compliance with the emission standards of 40 C.F.R. part 63, Subpart EEE.

Id. (emphasis added). Veolia's current permit not only expressly incorporates by reference the OPLs included in Veolia's DOC, but also mandates that Veolia operate ***only*** under those specific OPLs. *See id.* Thus, Veolia's current permit requires Veolia to follow the process set forth in the HWC MACT and adjust its OPLs through the required periodic performance testing conducted during the life of the permit. Through the incorporation of this process, Veolia's Title V permit is updated each time Veolia establishes revised OPLs in a DOC or NOC (after performance testing). However, the table provided in Section 2.1(C)(5) of the proposed Draft Permit—which inserts specific numerical OPLs for mercury, SVMs and LVMs—changes this relationship between Veolia's Title V permit and the development of OPLs under the periodic testing provisions of the HWC MACT. If the values for mercury, SVMs and LVMs contained in the proposed table control for the duration of the permit, then the permit will no longer track Veolia's periodic testing under the HWC MACT. This is both contrary to the purpose of the performance testing and diminishes its value.

In addition, the Draft Permit does not indicate what OPLs "trump"—those included in the table provided in Section 2.1(C)(5) or those established in Veolia's NOC and DOC and are incorporated by reference. Thus, if the Draft Permit becomes final as proposed, the permit will reference conflicting values and it is unclear which OPLs Veolia must follow. Thus, by inserting specific numbers for Veolia's OPLs for mercury, SVMs and LVMs in the permit, USEPA, at best, has made the permit unclear, and, at worst, has created contradictory requirements.

Moreover, Veolia developed and established OPLs and placed them in a DOC by October 14, 2008. Since that time, Veolia has revised the OPLs for mercury, SVMs, and LVMs to decrease the feedrate limits. At present Veolia, is operating under a NOC placed in Veolia's operating record in March of 2010 that does not use any extrapolation for the OPLs for mercury, SVMs, and LVMs. Veolia's current NOC also has lower OPLs for SVMs and LVMs than those included in USEPA's Draft Permit. Thus, not only does Veolia's current permit incorporate OPLs that assure compliance with the CAA, it also makes reference to OPLs for SVMs and LVMs that are more restrictive than what USEPA now proposes. Therefore, the proposed inclusion of OPLs in the Draft Permit are unnecessary and do not assure compliance any more than the OPLs already incorporated in Veolia's permit by reference.

The current permit also contains conditions that require Veolia to develop and implement a feedstream analysis plan. *See* Veolia Title V permit to Operate § 2.1(D)(4)(b). In fact, the conditions in Veolia's current permit are ***identical in every respect to the provisions of 40 C.F.R. § 63.1209(c) of the HWC MACT***. However, USEPA's supplemental feedstream analysis procedures that are included in the Draft Permit go far beyond what is set forth in the HWC MACT. *See* Section 2.1(D)(1)(i)(vi). In doing so, the Agency has also gone far beyond its authority to assure compliance as set forth in Title V. As set forth above, Section 7661c of Title V creates a two-tier scheme that provides USEPA the power to 1) impose permit conditions that ensure compliance with the CAA and 2) impose monitoring provisions that ensure that a source complies with the permit conditions. Through the promulgation of the HWC MACT, USEPA has already expressly established what feedstream analysis procedures are required to assure compliance with the CAA. Specifically, in Section 63.1209(c)(1) USEPA instructs that "prior to feeding the material, you must obtain an analysis of each feedstream that is sufficient to document compliance with the applicable feedrate limits provided by this section." 40 C.F.R. § 63.1209(c)(1). Then, in Subsection 63.1209(c)(2) through subsection (4), USEPA sets forth the requirements that must followed to ensure that the requirements of (1) are met. *Id.* §§ 63.1209(c)(2)-(4). Thus, in drafting Section 63.1209(c), USEPA already expressly determined how Veolia and every other incinerator must analyze feedstreams in order to document compliance with the "applicable feedrate limits" that are developed under the HWC MACT rule. These provisions appear verbatim in Veolia's current permit and Veolia has complied with these requirements in full. As USEPA itself has concluded, "Veolia's FAP literally has all of the elements that 40 C.F.R. Section 63.1209(c)(2)(i) through (vi) require." *See* Charles Hall Memo. at VES 0001293. USEPA's supplemental requirements are therefore not essential or necessary to ensure compliance with the CAA—the essential terms are already set forth in the HWC MACT and included in Veolia's current permit.

Further, USEPA's inclusion of a condition requiring Veolia to install a multi-metals CEMS is beyond the Agency's authority to assure compliance under Title V of the CAA. While Section 7661c provides USEPA with its authority, it also expressly limits that authority with regard to imposing permit conditions that require the use of CEMS. Specifically, Section 7661c(b) states as follows:

> (b) *Monitoring and analysis*
> The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, **<u>but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information</u>** for determining compliance.

42 U.S.C. § 7661c(b) (emphasis added). The text of this subsection limits the authority of the USEPA to impose unproven CEMS when other reliable methods are available. In the present instance, the HWC MACT supplies the approved methods of monitoring and analysis for HWCs to comply with emissions limits—i.e., the adherence to OPLs and the implementation of a FAP. *See* 40 C.F.R. § 63.1209. USEPA chose to include these methods in the HWC MACT because they are proven measures and produce reliable and timely information. Conversely, as demonstrated in these comments, multi-metals CEMS cannot supply reliable and timely information concerning emissions from commercial hazardous waste incinerators.

Moreover, the inclusion of multi-metals CEMS in Veolia's permit is certainly not essential or indispensable to ensuring that Veolia complies with the emissions limits of the HWC MACT. Rather, as USEPA has set forth, the multi-metals CEMs requirement is to ensure that Veolia's OPLs are adequate to assure compliance. *See* Statement of Basis at 21. USEPA has already determined, through promulgation of the HWC MACT, that feedstream analysis will ensure that the OPLs are assuring compliance with the emissions limits. Veolia's current permit includes verbatim all of the feedstream analysis provisions set forth in the HWC MACT rule. Thus, the Agency has already made its choice of requirements as provided by the two-tier approach set forth in Section 7661c, and imposing a redundant requirement of a multi-metals CEMs goes beyond what is necessary or essential to assure compliance. Thus, USEPA has exceeded the authority granted to it by Section 7661c(a) and (c) of the CAA (which is limited by Section 7661c(b)), and the requirement that Veolia install multi-metals CEMS should be deleted in its entirety.

B. USEPA Is Arbitrarily and Capriciously Using Unsubstantiated Enforcement Allegations to Support the Reopening and Modification of Veolia's Title V Permit

USEPA is improperly using unsubstantiated enforcement allegations to support the reopening of Veolia's permit. The allegations are unsupported, undeveloped, are not final agency action, and have not been subject to administrative or judicial review. As set forth below, USEPA has acted arbitrarily and capriciously in making these unsupported allegations and by including them in this permitting decision.

1. *The Findings of Violation Issued to Veolia Are Unsubstantiated*

USEPA sets forth and briefly summarizes (incorrectly) three Findings of Violation ("FOVs") that the Agency has issued to Veolia since approximately 2006. *See* Statement of Basis at 4 (VES 000142). These FOVs consist of unsupported, unsubstantiated, and highly contested allegations that should not be used to establish the required "cause" to reopen Veolia's permit under 40 C.F.R. § 71.7(f).

Furthermore, references to the FOVs are improper and have no place in the Agency's Statement of Basis because such references transform the reopening permit action into an enforcement action against Veolia. By this transformation, Veolia is deprived of the procedural safeguards it would ordinarily receive had the Agency brought an enforcement action pursuant to the FOVs. The Statement of Basis raises the allegations contained in the FOVs and—since there is no other reason to include the FOVs in the Statement of Basis—*assumes* the allegations contained within the FOVs are true for purpose of reopening the permit. Through the reopening, the Agency seeks to amend the permit in accord with the assumed truth of the FOVs' allegations. Thus, Veolia is being deprived of the procedures that would be available in the enforcement context to contest the allegations contained within the FOVs.

By USEPA's own admission a FOV is of no legal consequence:

> An FOV is simply one step in the EPA's enforcement process. This step is commonly followed by additional investigation or discovery, information

> gathering, and an exchange of views, all of which occur in the context of an enforcement proceeding, and are important means of fact-finding under our system of civil litigation. An FOV is not a final agency action and is not subject to judicial review. *No binding legal consequences flow from an FOV, and an FOV does not have the force or effect of law.*

Statement of Basis at 6 (emphasis added)(VES 000144). As such, an FOV may consist of nothing more than naked assertions with no factual basis (although it is contemplated that the claims will be developed as the process continues). The FOVs USEPA has served on Veolia are comprised of misstatements and claims that cannot be substantiated. In meetings with USEPA legal personnel, Veolia and its counsel have repeatedly requested that the Agency provide Veolia with evidence supporting the USEPA's claims that Veolia violated the emission requirements of the HWC MACT. However, USEPA has failed to provide any evidence or analysis showing that Veolia has violated the HWC MACT emission standards. Harris Aff. at VES 008390.

Further, the investigation, discovery, and the exchange of views contemplated by USEPA's enforcement process have been totally absent with regard to the FOVs served on Veolia. Despite Veolia's efforts to meet with the Agency, in an effort to understand the claims being made against it, the Agency has totally failed to support or develop the allegations so that Veolia can appropriately answer and/or rebut the Agency's claims. Also, so much time has passed with regard to the allegations contained in the 2006 and 2008 FOVs that the statute of limitations has expired with regard to some or all of those claims. Because of the Agency's failure to develop these FOVs, the claims contained in them are no longer subject to enforcement, have no relevance, and cannot justify the reopening of Veolia's permit.

In addition, as specifically set forth below, the assertions contained in the 2012 FOV likewise provide no basis to reopen Veolia's Title V permit and do not support the revisions proposed by USEPA.

(i) <u>The August 24, 2012 FOV</u>

The FOV issued to Veolia on August 24, 2012 identified three separate categories of alleged violations: 1) that Veolia failed to provide certain information to USEPA pursuant to the March 2010 Information Requests; 2) that Veolia failed to establish correct OPLs for mercury based on the metals testing it conducted in 2008; and 3) that Veolia failed to appropriately analyze certain waste streams prior to incineration. *See* August 2012 FOV at VES 001356-001365.

Each of the alleged violations arises out of long-running points of contention between the Agency and Veolia, but none of the alleged violations supports the reopening of Veolia's permit.

(a) *Veolia's Alleged Failure to Provide Information Pursuant to the March 2010 Information Requests*

The March 2010 Information Requests issued to Veolia were just one event in a long series of negotiations between Veolia and the Agency regarding metals testing, CEMS, and OPLs for mercury. To understand why the allegations in the August 2012 FOV recklessly misrepresent

Veolia's actions and compliance history, it is imperative to understand the sequence of events surrounding the March 2010 Information Requests.

USEPA first served an information request on Veolia regarding metals testing on February 22, 2008 ("February 2008 Information Requests"). The February 2008 Information Requests directed Veolia to perform comprehensive performance testing on all three incineration units by July 15, 2008. *See* February 2008 Information Requests at VES 002450-002452. On March 10, 2008, Veolia submitted a formal written response to the February 2008 Information Requests. *See* Veolia's March 10, 2008 Response at VES 004695-004706. In its response, Veolia agreed to conduct the testing requested by USEPA, but stated that it could not do so by July 15, 2008. Veolia further supported this assertion by attaching an affidavit from Craig Doolittle of ENSR Corporation (Veolia's stack-testing contractor) agreeing that it was not feasible to plan and perform in less than five months testing that would normally take a year or more.

Veolia and the Agency met to discuss the February 2008 Information Requests on March 13, 2008. USEPA acknowledged that the schedule included in the February 2008 Information Requests was unrealistic in light of the time needed to plan, prepare, and perform the CPTs. Veolia agreed to propose an alternative, more practical, schedule and submit it to the USEPA. The schedule Veolia proposed stated that the three testing programs would be completed between August of 2008 and April of 2009. *See* Veolia's March 21, 2008 Email (transmitting Veolia's proposed CPT schedules) at VES 004710-004720. However, this alternative schedule was rejected by USEPA.

The next discussion regarding the February 2008 Information Requests took place on April 25, 2008. During a phone call that day between Veolia and USEPA, the Agency instructed Veolia that it had to choose either to complete the metals testing, pursuant to the Agency's very tight time frame, or alternatively to choose one of four options for metals compliance that would be included in Veolia's long-delayed Title V permit. The four options presented to Veolia were: 1) cease incinerating any wastes containing MACT metals; 2) install mercury CEMS; 3) accept OPLs developed by USEPA; or 4) settle previously discussed compliance concerns with issue resolution incorporated into the Title V permit. After negotiations, Veolia—although knowing that conducting performance testing within this expedited time period would be challenging and result in increased costs and, more importantly, increased risk of calculation error as a result of reduced QA/QC review time—chose, with the agreement of USEPA, to conduct the metals testing instead of one of the four alternatives presented by the Agency.

To memorialize the agreement between the Agency and Veolia regarding the metals testing, the USEPA agreed to revise and reissue the February 2008 Information Requests. USEPA issued these revised information requests on June 5, 2008 (the same day USEPA issued Veolia's draft Title V permit). *See* June 2008 Information Requests at VES 004721-004733. The June 2008 Information Requests required Veolia to, among other things: commence performance testing for LVMs, SVMs, and mercury by no later than August 15, 2008; submit the results of this testing in a Notification of Compliance ("NOC") by September 26, 2008; and submit an application for significant modification to its Title V permit (to include the OPLs for mercury, SVMs, and LVMs developed by the metals testing in the Title V permit) by September 26, 2008.

Thus, the June 2008 Information Requests were specifically negotiated to address three key issues: 1) the date by which Veolia would provide test data for mercury, SVMs, and LVMs; 2) the development of OPLs for mercury, SVMs, and LVMs using the test data; and 3) the manner in which metals would be handled under the Title V permit (i.e., the Agency required Veolia to submit an application for modification of the permit after it was issued to include OPLs developed from the test data).

Pursuant to the June 2008 Information Requests, Veolia performed the stack testing for LVMs, SVMs, and mercury in August and September of 2008. On September 12, 2008, USEPA formally issued a Title V permit to Veolia. Veolia's final Title V permit did not contain OPLs for LVMs, SVMs, and mercury. On September 16, 2008, at Veolia's request, USEPA issued another revised Section 114 Information Request extending Veolia's deadline to submit the test data, NOC, and its application for significant modification from September 26, 2008, until October 10, 2008. *See* September 2008 Information Requests at VES 002713-002726. The extension provided Veolia with additional time to add information collected during the September portion of the metals testing.

On October 10, 2008, pursuant to the February, June, and September 2008 Information Requests, Veolia submitted a NOC, the test reports for incinerators 2, 3, and 4, and an application for significant modification to Veolia's Title V permit. *See* Veolia's Oct. 10, 2008 Submission at VES 000743-000917. In its application for significant modification, Veolia, as required by the Agency, submitted revised OPLs for mercury, SVMs, and LVMs. *See* September 2008 Information Requests at VES 002713-002726.

At the direction of USEPA, Veolia submitted a revised application for significant modification to USEPA on or about January 6, 2009. Veolia Jan. 2009 Sig. Mod. at VES 000918- 000922. This revision lowered (i.e., made the OPLs more restrictive) for LVMs, SVMs, and mercury based on a revised calculation for the moisture content of the solid waste that was fed to the incinerator during the August and September 2008 metals testing.

After completing all of the requirements of the negotiated June 2008 Information Requests and submitting a revised application for significant modification in January 2009 at the Agency's direction, Veolia was very surprised when it received another information request from USEPA, dated January 29, 2009 ("January 2009 Information Requests"). Veolia was even more surprised when it learned that the January 2009 Information Requests directed Veolia to install mercury CEMS on the three hazardous waste incinerators located at the Sauget facility within 30 days of Veolia's receipt of the requests. *See* January 2009 Information Requests, at VES 006369-006379. This was especially true since USEPA told Veolia during the phone call on April 25, 2008 that Veolia could choose one of five options, including installing mercury CEMS and it had specifically chose with USEPA's agreement to perform the metals testing instead.

After being denied an extension of time to evaluate USEPA's directive to install millions of dollars' worth of monitoring equipment, Veolia responded within the required 30-day deadline provided by the January 2009 Information Requests. Veolia objected to the premise of the information requests—that they were to "determine whether [Veolia] ... is complying with the Hazardous Waste Combustor MACT"—because Veolia had just established compliance with the

HWC MACT through USEPA approved and directed performance testing. Veolia Mar. 4 Response at VES 006388-006389. Further, Veolia asserted that if USEPA's intention had always been to require Veolia to install mercury CEMS technology, USEPA should have made Veolia aware in April of 2008 that the Agency was going to require the installation of CEMS technology for metals before Veolia incurred hundreds of thousands of dollars in costs and spent hundreds of hours of staff time completing the metals tests pursuant to the June 2008 Information Requests. *Id.* at VES 006391.

Veolia's response demonstrated that the installation of mercury CEMS was impractical and improper for the purposes of trying to ensure HWC MACT compliance. Specifically, Veolia made the following points, among others, concerning the problems associated with the application of mercury CEMS to its incineration units:

- After diligent inquiry, Veolia did not discover any successful mercury CEMS implementation efforts on any commercial hazardous waste incinerators in the United States. Moreover, the CEMS technology employed in the electric utility industry and on European commercial hazardous waste incinerators is not applicable to, and significantly different than, the CEMS technology that USEPA directed Veolia to install.

- The 30-day period provided by USEPA in the Information Requests for design, selection, purchase, manufacture, and installation of three mercury CEMS, and acquisition and configuration of a Data Acquisition System (DAS) was unreasonable, unachievable, and contrary to good practice. It also was contrary to USEPA's own guidance,[20] and inconsistent with the time period allowed for implementing CEMS programs in numerous other regulations. Moreover, the 30-day time period is not achievable for any single CEMS application, much less three separate mercury monitoring systems.

- USEPA required the CEMS to be "installed, evaluated, and certified in accordance with the proposed Performance Specification 12"; however, no commercially available mercury CEMS can meet the requirements for either Draft Performance Specification 12 or Performance Specification 12A.

    - USEPA has never officially promulgated Draft Performance Specification 12 and has never subjected the specification to notice and comment rulemaking procedures.

[20] Center for Environmental Research Information, USEPA, EPA Handbook: Continuous Emission Monitoring Systems for Non-Criteria Pollutants, EPA/625/R-97/001 (April 1997), attached at VES 004160-004329.

- Draft Performance Specification 12 contains numerous technical errors (as well as careless typographical errors duplicated in other "draft" performance specifications) and is inappropriate for mercury monitoring applications.

- Draft PS12 requires the use of National Institutes of Standards and Technology ("NIST") traceable mercury calibration standards for both elemental and oxidized mercury that are not yet available because such traceability protocols are still under development.

- Draft PS12 mandates the use of NIST traceable standards for oxidized mercury which do not exist at any concentration level.

- The Information Requests lacked any reference to averaging period for reporting data from the CEMS. A CEMS attempting compliance with any emission standard must include both a numerical limit and an associated averaging period.

- The commercially available CEMS that USEPA was forcing Veolia to consider under the Information Requests provides wet basis measurements; however, under 40 C.F.R. Part 63, Subpart EEE, compliance determinations are based on dry basis measurements. USEPA provided no information as to how this conversion would be made.

- The Information Requests referenced citations that do not exist in the Code of Federal Regulations.

Because of these defects and others with the CEMS required by the January 2009 Information Requests, Veolia concluded:

> Veolia believes that the mercury CEMS technology is not a demonstrated compliance monitoring technology for commercial hazardous waste incinerators. Rather, the best method for Veolia and other hazardous waste incinerators to accurately demonstrate compliance with the MACT metals standards is through performance testing and the development of OPLs. This is supported both by the stringent and detailed CPT MACT metals requirements of 40 C.F.R. Part 63, Subpart EEE and USEPA Region 5's own representations to Veolia regarding the use of OPLs over CEMS technology. Specifically, in an April 16, 2008 memorandum directed to Veolia, which was approved by Section Chief William MacDowell, Region 5 stated the following regarding the use of CEMS for MACT metals:
>
> > Although continuous emission monitors (CEM) for dioxin/furan, mercury, PM, SVM/LVM, and HC1/C12 do exist, the HWC MACT does not require them. EPA has not promulgated a performance specification for HC1/C12 CEMS. A DRE CEM is technically possible, but the case engineer does not know of any facility that uses one. **Until EPA requires a CEM for each standard, we will have to rely upon OPLs as surrogates for**

> **them. In order for OPLs to assure compliance reliably, the owner or operator must establish OPLs from CPT operating data on the same incinerator, under known test operating conditions.**
>
> Memorandum from Charles Hall, Environmental Engineer, USEPA Region 5, to Veolia, through William MacDowell, Chief of MN/OH Air Enforcement and Compliance Assurance Section, USEPA Region 5, 11 (April 16, 2008), attached as Exhibit N. (footnote omitted) (emphasis added). As discussed above, and in accordance with the agreement reached with USEPA, Veolia conducted performance testing in August and September of 2008 and used the results from that testing to develop OPLs, without extrapolation, that Veolia is currently operating under in full compliance with the MACT metals standards.

Veolia Mar. 4, 2009 Response at VES 006393. After Veolia submitted its detailed response on March 4, 2009, USEPA and Veolia met to discuss the January 2009 Information Requests on May 13, 2009. At the May 13, 2009, meeting, USEPA conceded that 30 days had been an insufficient period of time to install the CEMS contemplated by the January 2009 Information Requests. Moreover, the Agency acknowledged that NIST had yet to come up with a traceable calibration standard that could begin to verify the accuracy of data produced by the proposed mercury CEMS. USEPA also conceded that they referenced the wrong Performance Specification—Draft PS12—in their information requests and that, to their knowledge, no mercury CEMS had yet been installed and successfully operated at a commercial hazardous waste combustion facility in the United States. Despite these errors and admissions, USEPA indicated that it would not withdraw the January 2009 Information Requests and maintained that the Agency intended to use the data collected via the CEMS for compliance with the HWC MACT and possible enforcement. However, the Agency did indicate that it wished to continue the dialogue with Veolia and ended the meeting by stating that Agency personnel would contact Veolia for further discussions—with the eventual goal being some sort of settlement regarding compliance. *See* Harris Aff. at VES 008388.

However, instead of a discussion regarding settlement, the next meaningful contact that Veolia received from the Agency were the March 2010 Information Requests. USEPA sent the March 2010 Information Requests to Veolia without explanation or prior notification. The March 2010 Information Requests consisted of a slightly revised version of USEPA's flawed January 2009 Information Requests with a few material changes to the relevant requests. The primary material change in the March 2010 Information Request was that USEPA attempted to fix the deficiencies that plagued the January 2009 version by impermissibly shifting from itself to Veolia the burden of creating technical standards to verify the data generated by the mercury CEMS that USEPA itself had failed to devise. (A strikethrough comparison of the January 2009 and March 2010 Information Requests is attached at VES 006420-006438.)

Veolia responded to the March 2010 Information Requests on March 25, 2010. *See* Veolia's March 25, 2010 Response at VES 006346-006468. In addition to numerous general objections, Veolia objected to the Information Requests on the grounds that (a) they were unconstitutional as they placed Veolia in a position of incurring penalties for noncompliance without any opportunity for administrative or judicial review; (b) they represented an attempt by the Agency

to unlawfully modify Veolia's Title V permit; (c) they represented an attempt by the Agency to deprive Veolia of its due process rights by circumventing Veolia's appeal of its RCRA Part B Permit; and (d) they were arbitrary and capricious and lacked a rational basis because they ignored Veolia's demonstrated compliance with the HWC MACT Rule. However, despite these objections, Veolia again offered to meet with the Agency in an attempt to work out a compromise.

On April 28, 2010, Veolia sent a team of decision makers to meet with USEPA at USEPA's Raleigh, North Carolina Research Triangle Park facility. At these meetings, the Agency was unable to identify a location where mercury CEMS technology had ever been successfully utilized in the United States on a commercial hazardous waste incinerator. Veolia expressed its belief, based upon Veolia's experience in operating its commercial hazardous waste incinerators, that the high moisture, high temperature environment found in the incinerators and the wide variations of mercury found in the feed combined to make the Veolia incinerators the most challenging environment in which anyone had ever proposed to operate a mercury CEMS. Veolia believed that the technology was likely to fail and would succeed, if ever, only after the mercury CEMS endured many failures and Veolia incurred much time and expense attempting to force the technology to successfully operate. The Agency did not disagree and offered no evidence to the contrary. As a result of the discussions, the Agency offered to entertain alternative methods to obtain the relevant emissions information. Harris Aff. at VES 008388.

In response to USEPA's invitation to offer alternative methods as part of the ongoing discussions between the parties, on May 25, 2010, Veolia offered, in relevant part, to install additional technology in the form of activated carbon injection systems on incinerators 2 and 3, provided that all approvals were in place. Carbon injection systems *actually reduce emissions* as opposed to simply monitoring emissions. *See* Veolia's May 25, 2010 Letter at VES 006469-006471. Veolia further proposed that it would provide the Agency with additional data by scheduling and performing mercury emission testing in accordance with the USEPA approved 2008 performance test plans. This testing would document whether incinerator units 2, 3 and 4 met all applicable mercury MACT Standards. Despite its offer to entertain alternatives to the March 2010, Information Request, the Agency never provided an analysis or otherwise responded to the merits of this proposal.

In fact, USEPA did not bring up the March 2010 Information Requests—or mention CEMS at all—until Veolia received the August 2012 FOV. The August 2012 FOV states, without explanation, "[t]o date, Veolia has failed to provide any of the information required by the March 10, 2010 Information Request in violation of Section 114 of the CAA." August 2012 FOV at VES 001364. Quite conversely, as set forth in these comments and in Mr. Harris' Affidavit, it was ***USEPA*** that never provided any response to Veolia's March 4, 2009, response to the January 2009 Information Requests, Veolia's March 25, 2010 response to the March 2010 Information Requests, or Veolia's May 25, 2010 offer to install carbon injection systems as a way to resolve the CEMS issues. *See* Harris Aff. at VES 008387-008388.

Throughout this entire period, Veolia has been presented with no evidence demonstrating Veolia's noncompliance with the HWC MACT emission standards as set forth in the August 2012 FOV. Moreover, given this history, USEPA's demand that Veolia install mercury CEMS as set forth in the March 2010 Information Requests—an expensive, experimental technology

that cannot be used to establish MACT compliance—has no rational basis and is arbitrary and capricious.

(b) *Allegation that Veolia Failed to Establish and Abide by Appropriate OPLs for Mercury Emissions*

As detailed above, Veolia and USEPA have communicated extensively from 2008 forward concerning Veolia's emissions. Throughout this period, Veolia worked cooperatively with USEPA in an effort to establish appropriate OPLs. In August and September of 2008, Veolia undertook performance testing to establish OPLs for mercury, SVMs, and LVMs as detailed in the June 2008 Information Requests. Prior to conducting the tests, Veolia provided USEPA with Veolia's Metals Performance Test Plan, which set forth how the testing would be performed and how the waste would be spiked with mercury prior to being fed into the incinerator. *See* VES 002633-002707. Further, during the August 2008 performance testing, Veolia provided split samples to USEPA's Region 5 Land Group at USEPA's request. As reflected in the plan provided to USEPA, Veolia retained ENSR Corporation (which is now a part of AECOM, Inc.) to perform the stack testing. ENSR retained the services of the outside lab Maxxam Analytics, Inc. to evaluate and analyze the collected samples on behalf of Veolia. Maxxam in turn sub-contracted the analysis to PSC Environmental Systems to perform ash and heating value analyses of the waste samples.

The accepted analytical method for the metals analyses of the solid waste samples from the tests was that the testing was to be performed on the samples on an "as received" basis. Maxxam followed a procedure, common for soil samples, that included a step that dried the samples prior to analyzing for metals content. This most likely inflated the reported metals concentrations. It was presumed that the metals analysis reported by the lab were on an "as received" basis since the lab reports did not indicate otherwise (as is typically done when analyses are performed on a dry basis). The fact that the samples were first dried before analyses were performed was discovered in early November of 2008. Maxxam was instructed to repeat their drying procedure, following the same protocol as was originally performed, on the remaining solid waste samples for Units 2 and 3 (no samples remained from Unit 4 testing) and record before and after weights so a moisture percentage could be determined. After these moisture determinations were received, mercury feed rates for the testing were recalculated and Veolia lowered the mercury feedrate limit set forth in its DOC from 0.0047 lb/hr to 0.0034 lb/hr on Units 2 and 3 on November 18, 2008. *See* VES 007582-007589. Since Maxxam did not have any Unit 4 solid waste samples remaining, it was determined that the most conservative, and only known, moisture values for the Unit 4 solid samples (from PSC analytical results) would be used to recalculate the mercury feedrates for the testing on Unit 4. Upon completing this calculation, Veolia lowered Unit 4's mercury feedrate limit set forth in its DOC from 0.031 lb/hr to 0.026 lb/hr on November 25, 2008. *See* VES 007590-7595. Veolia promptly notified USEPA personnel of the new calculations and the reasons for the new calculations. It should be noted that Veolia strongly believes that USEPA's insistence that the 2008 metals testing be conducted on an expedited basis—in a shorter timeframe than provided for in the HWC MACT—significantly contributed to the moisture issue not being discovered until November 2008. In fact, if Veolia had been provided with three months to prepare the test reports as provided under the regulations, this issue would have been identified and corrected within the three month period since it was corrected in November of 2008.

On or about July 28, 2009, USEPA's Land and Air Groups initiated a call with Veolia staff. During this call, USEPA expressed satisfaction with the preparation of the spiked sample for mercury but continued to express concern with the moisture content of the solid samples. This was part of an ongoing discussion with USEPA in which USEPA alleged on a number of occasions that analysis the Agency had conducted on the 2008 split samples—specifically with regard to moisture content—was inconsistent with Veolia's analysis even after Veolia had adjusted the OPLs in November of 2008. During these discussions, Veolia repeatedly offered to use USEPA's moisture content or, in the alternative, use the most conservative moisture content to develop new OPLs. *See* Veolia's July 6, 2009 Response at VES 004833-004841. USEPA continually rebuffed these attempts to settle the dispute by refusing to provide Veolia with the moisture content USEPA allegedly found via analysis of its own split samples. Harris Aff. at VES 008387.

In an effort to resolve the dispute with USEPA, but without the benefit of USEPA's analytical data from the split samples, Veolia searched for a logical nexus for an even more conservative moisture value. Veolia determined that PSC's analytical methods resulted in an even more conservative moisture value then Maxxam's (due to drying temperature) and therefore used PSC's moisture results to establish even lower OPLs. These revised OPLs were placed in Veolia's NOC on March 16, 2010, for Units 2 and 3. Veolia used PSC's moisture results not because Veolia believed them to be more accurate, rather simply as an accommodation to USEPA and in an effort to bring final resolution to the moisture issue. During a meeting in Springfield, Illinois on March of 2011, USEPA representatives finally agreed that the moisture issue was resolved.

It is important to note that from March 10, 2008, to the present, Veolia has followed USEPA's specific directive that Veolia comply with the October 10, 2008, OPLs. *See* USEPA's December 5, 2008 Letter at VES 007553-007560. Further, during this time period, Veolia never exceeded its mercury emission standard of 130 ug/dscm based on its actual feedrate.

(c) *Allegation that Veolia Failed to Appropriately Analyze Certain Waste Streams*

The 2012 FOV alleged that Veolia failed to appropriately profile and analyze certain wastes it receives for incineration. The allegations arose out of an inspection conducted at the Veolia facility by the USEPA's National Enforcement Investigations Center ("NEIC") between December 5, 2011, and December 15, 2011. The August 2012 FOV contained excerpts from the NEIC's final report regarding the inspection; however, the USEPA did not provide Veolia with a copy of the NEIC report prior to issuing the August 2012 FOV. The excerpts of the NEIC report that were included contained errors, moreover, because the report was excerpted, the totality of the NEIC's findings with regard to Veolia were unclear—i.e., it was unclear whether the NEIC had generally found Veolia to be in compliance and had only found a small number of minor issues, or whether the NEIC had determined there were larger compliance issues.

In response to the August 2012 FOV, Veolia scheduled a meeting with USEPA on September 18, 2012. On September 17, 2012, the day before the scheduled meeting on the August 2012 FOV, USEPA sent Veolia a Notice of Violation ("NOV"), dated September 13, 2012. Sept.

2012 NOV at VES 006478-006481. The September 2012 NOV contained the same allegations based on the NEIC inspection that were contained in the August 2012 FOV. In addition, although it contained nearly identical allegations, the September 2012 NOV was sent by the RCRA Branch of Region 5 USEPA.

Veolia representatives met with USEPA on September 18, 2012, in Chicago to discuss both the FOV and the NOV. During the meeting, Veolia informed USEPA that it could not properly respond to the violations alleged in the FOV and the NOV without receiving a copy of the NEIC Report, which, at the time of the meeting, Veolia had requested but had not received. In addition, based on the information set forth in FOV and the NOV, Veolia stated that the NEIC Report appeared to contain errors. USEPA's assistant regional counsel, Sabrina Argentieri, requested that Veolia set forth in writing the allegations that Veolia believed to be erroneous to the extent Veolia could do so without having the benefit of having reviewed the NEIC Report. On September 26, 2012, Veolia provided Ms. Argentieri with the requested written analysis.

Veolia finally received a copy of the NEIC report on September 28, 2012. The NEIC report stated that the specific purpose of the investigation was to determine Veolia's compliance with 40 C.F.R. Part 63.1209(c) (analysis of feedstreams) under the Clean Air Act and Veolia's compliance with its Waste Analysis Plan ("WAP") under RCRA. *See* NEIC Report at VES 001330. The NEIC report did not offer conclusions or compliance/enforcement recommendations; rather, the report set forth four "observations/areas of concern" regarding Veolia's waste profiles. These "observations/areas of concern" eventually ended up in the FOV and NOV served on Veolia. After having reviewed the NEIC Report, Veolia confirmed that the NEIC Report contained errors. Veolia provided a written response to the allegations via letter dated October 12, 2012. (A copy of Veolia's October 12, 2012 response is attached as VES 006483-006502.) Specifically, Veolia responded to each one of the USEPA's allegations regarding Veolia's waste profiles:

> Since the effective date of the Incinerator MACT Rule, Veolia has had a Metals Testing Protocol in place that has been provided to USEPA, along with a Waste Analysis Plan (WAP) and Feed Stream Analysis Plan (FAP). This protocol along with the WAP and FAP determines if metals analysis needs to be conducted and how often based on the generator's provided waste profile sheet including metal analysis, MSDSs, and additional generator-provided information. The facility's on-site laboratory is equipped with two Inductively Coupled Plasma ("ICP") units and two direct mercury analyzers ("DMA") that support this effort. These instruments are continually upgraded to keep up with improved technology/software. These protocols and plans, along with the on-site laboratory's capabilities, ensure that the wastes being received are properly evaluated and the metal concentrations are correctly determined. In addition, Veolia has a metals suspect list that is continually updated and that requires those suspect wastes to undergo metals analysis.
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> <u>USEPA Allegation No. 1:</u> *Veolia was using toxicity characteristic leaching procedure (TCLP) results instead of total metals concentrations. NEIC identified the presence of conflicting metals data between the profile package and the information in the WTS and in the incineration control system (ICS).*

For profile 236152, an MSDS contained in the profile package listed the chromium concentration as "3 to 6 percent chromium as chromium oxide" (30,000 to 60,000 mg/kg). TCLP values from off-site analytical (SGS Environmental Services, Inc. on 3/24/06) were 11.4 mg/L for Chromium and 0.876 mg/L for Cadmium. Veolia stated that 20 times TCLP values were used (228 and 17.52 mg/L) for the incinerator feed rate calculations, although there are no values in the WTS query that were provided.

Veolia Response No. 1: Profile 236152 is rarely used and has only shipped on four occasions since April of 2006. This waste stream is comprised of spent filter media (carbon with chrome). The MSDS in the profile package is for unused carbon with copper and chromium and is provided as additional information, not to establish a metals concentration for the waste. As a result, the concentration value defined on the MSDS would not be in the WTS or ICS. Following discussions with NEIC, currently this spent filter media waste stream is sampled and analyzed for metals every time it is received. Finally, after reviewing the NEIC inspection report, it does not reflect accurately Veolia's procedures for managing the total metals concentrations in the WTS and ICS. The profile package may contain additional information (from MSDSs) that is not representative of the actual waste stream. In this case, the MSDS in the profile package was unused carbon with copper and chromium, where the actual waste stream was spent filter media (carbon with chrome). The 228 mg/l for chromium was consistently used in the profile package and in the WTS and ICS. If the NEIC continues to have concerns, Veolia will need additional information from the NEIC in order to address the NEIC's concerns, if any.

USEPA Allegation No. 2: *The profile package for 691163 has a TCLP value for chromium of 1.8 mg/L, while the WTS and ICS used a value of 0 mg/L. Chromium is likely much greater than 20 times the TCLP concentration of 1.8 mg/L, an off-site analysis result that was found in the profile package. No on-site metal analyses has been conducted.*

Veolia Response No. 2: Veolia reviewed this profile and determined that it did not take the TCLP data and multiple by 20 to obtain the metals concentration. This waste stream is not a metals suspect waste so in accordance with Veolia protocols, metals analysis is not required. The TCLP values included in this waste profile were all below detection limits. Moreover, the 1.8 mg/L value referenced in both paragraph 45(b) of the First Letter and paragraph 2 of the Second Letter was not included in this profile. If the NEIC continues to have a concern, Veolia needs additional information from the NEIC in order to address the NEIC's concern, if any.

USEPA Allegation No. 3: *Veolia profile reviews were based on general processes that did not consider the possibility for variability in volatile or semivolatile metals concentrations. For example, profiles 660210 and*

CI5789 both are described as "cyanide containing wastes." While both profiles list cadmium cyanide as a possible constituent, Veolia uses a value of 6,470 mg/kg cadmium for profile CI5789 and 1 mg/kg cadmium for profile 660210. These are very similar waste streams generated by different generators, therefore there could be variability between waste streams.

Veolia Response No. 3: These are not "very similar waste streams"; rather, CI5789 is bulk liquid waste that comes to Veolia in 5,000 gallon shipments and 660210 consists of containers filled with individually-packaged and labeled unused products. The cadmium cyanide concentration for CI5789 is based on analytical analysis, while the concentration present in 660210 is known because it is unused material (and was confirmed through analysis). Veolia believes this further explanation adequately addresses NEIC's issues. If the NEIC continues to have concerns, Veolia will need additional information from the NEIC in order to address the NEIC's concerns, if any.

USEPA Allegation No. 4: *The profile package for AF3753 has a total mercury value of 4140 mg/kg (TCLP value of 37.8 mg/L), but the WTS and ICS used a value of 25 mg/kg for at least 5 years. Having conflicting values between profile packages and databases, without a clear indication as to which value is correct, could lead to the use of incorrect metals concentrations for feed rate calculations. Veolia stated that a total mercury analysis was measured and the measured value of 25 ppm is used for the incinerator feed rate calculations, rather than the profile values stored in the WTS. Since the historical data in the profile indicates a mercury value as high as 4140 mg/kg, this waste stream might not have a total mercury value of 25 ppm every shipment.*

Veolia Response No. 4: The 4140 mg/kg value is a historical value that dates back to the early 1990s. In 2004, when the MACT standards came into effect, the analysis for profile package AF3753 was updated and the updated analysis showed mercury to be below 25 mg/kg. Therefore, Veolia used a value of 25 mg/kg for the incinerator feed rate calculations. Recently, the generator validated Veolia's use of the 25 mg/kg mercury figure when the generator amended profile AF3753 to list 0-50 mg/kg thimerosal. Thimerosal is 49.55% mercury. Given that the upper limit of profile AF3753 is 50 mg/kg thimerosal, the upper limit of profile AF3753 for mercury is 49.55% of 50 mg/kg or 24.78 mg/kg. Pursuant to applicable regulations, Veolia has the right to rely upon the generator's representations. Further, the generator's representations are in agreement with Veolia's own analysis. Finally, after reviewing the NEIC inspection report, it does not reflect accurately Veolia's procedures for managing the total metals concentrations in the WTS and ICS. The profile package matched the WTS and ICS. If the NEIC continues to have concerns, Veolia will need additional information from the NEIC in order to address the NEIC's concerns, if any.

> USEPA Allegation No. 5: *For Profile 374339, Veolia stated that a total metals analyses was run on-site and total MACT metals were used for IPS/WTS. Since the waste type listed on this profile is "Organic Debris," this waste stream is variable and should be analyzed each time a load is received.*
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> **Veolia Response No. 5:** While not to the exclusion of its own sampling and analysis, Veolia has the right to rely upon the generator's representations relating to the waste stream under applicable regulations. However, Veolia is sampling and analyzing this waste stream for metals every time it is received and the metals concentrations are adjusted as such in the WTS and ICS based on that current analysis.

Veolia's Oct. 12, 2012 Response at VES 006483-006502. As Veolia's responses indicate, the waste analysis allegations contained in the FOV and NOV were either based on misunderstandings of Veolia's waste profiles and waste profile system, or were just erroneous. Moreover, Veolia, although it was not required to do so, instituted a program to test many of the incoming wastes streams identified in the NEIC report for metals every time those wastes are received at the facility. USEPA failed to provide any response, comment, or reaction to Veolia's October 12, 2012, response.

In sum, each and every allegation contained in the August 2012 FOV has been resolved, rebutted, clarified, or otherwise addressed by Veolia during the negotiations with the Agency over Veolia's HWC MACT compliance that have taken place over the last several years. Moreover, despite the time, effort, and resources Veolia has spent to engage USEPA regarding the issues raised in the August 2012 FOV, the Agency has offered no response and provided no other support for its allegations. The Agency has taken no final action—nor taken steps toward final agency action—that show that Veolia is out of compliance. As such, the naked accusations contained in the 2012 FOV cannot support the reopening of Veolia's permit or the proposed modification of Veolia's permit shield.

2. *Alleged Referrals by the IEPA to the Illinois Attorney General*

On Page 4, footnote 2, of the Statement of Basis, USEPA sets forth the following:

> [2]On February 26, 2007, the Illinois EPA referred Veolia to the Illinois Attorney General for alleged violations of the Illinois Environmental Protection Act, the Illinois Pollution Control Board Regulations, and the HWC MACT. On March 5, 2010, after receiving additional information, the Illinois EPA referred additional alleged violations of the Illinois Environmental Protection Act, the Illinois Pollution Control Board Regulations, and the HWC MACT.

Statement of Basis at 4 n.2 (VES 000142). Veolia has never received any notice of any kind regarding these alleged violations referred to the Illinois Attorney General by IEPA. Nor has the Illinois Attorney General, to Veolia's knowledge, ever pursued such allegations in any way. Moreover, the passage of time since these alleged referrals were supposedly made (more than six years and three years, respectively) strongly suggests that, even if these referrals were made, the

Illinois Attorney General long ago deemed them unworthy. USEPA's inclusion of this footnote in the Statement of Basis is improper and negligent, and demonstrates the Agency's bias and malice against Veolia in bringing this permit reopening proceeding. These unspecified and unsubstantiated allegations provide no support for any of USEPA's permitting actions with regard to Veolia.

All references to the 2006, 2008, and 2012 FOVs and any reference to alleged violations referred to the Illinois Attorney General by IEPA should be removed from the Statement of Basis. It would be arbitrary and capricious for USEPA to rely on unsupported, unsubstantiated, and unidentified enforcement allegations to support the assertion that the Agency has "cause" to reopen Veolia's Title V permit.

C. USEPA's Permit Reopening Violates Veolia's Due Process Rights

The administrative procedures USEPA is following in this permit reopening are constitutionally inadequate as applied to Veolia because they do not give Veolia an adequate opportunity to contest the alleged violations of the Clean Air Act that USEPA is using to justify the reopening.

Veolia is not a manufacturing facility. It does not make commercial or industrial products. Rather, Veolia's sole business is to destroy hazardous waste in a safe and effective manner by incinerating that waste. The incineration process does not create products; it creates air emissions. Under Section 7661a of the CAA, Veolia cannot operate its incinerators and create air emissions without a valid permit. *See* 42 U.S.C. § 7661a. In addition, while the Clean Air Act contemplates that sources required to have permits may be permitted by state-regulatory agencies with delegated programs—like IEPA—USEPA has taken over the Title V permit process as it relates to Veolia. Veolia cannot obtain a Title V permit from any other authority other than USEPA. Thus, USEPA holds a unique and powerful authority over Veolia's sole business activity.

As demonstrated in the procedural background included in these comments, USEPA has subjected Veolia to a barrage of enforcement actions beginning with the issuance of the 2006 FOV and continuing with a half-dozen Section 114 information requests, and the 2008 and 2012 FOVs. In each instance, USEPA alleged significant violations of the CAA or asserted that violations formed the basis of the Agency's requests for information. However, also in each instance, USEPA provided little or no factual support for its assertions and failed to substantively respond to Veolia's submission of information in response to the Agency's accusations. In addition, USEPA has carried on this process in a manner that ensured Veolia could not seek judicial review.

The unsupported nature of its accusations notwithstanding, USEPA is now using its Title V authority over Veolia to continue its pursuit of Veolia. USEPA's actions are an unlawful and an inappropriate use of the Title V program that has resulted in the violation of Veolia's due process rights. The permit conditions that USEPA imposes in this reopening gravely threaten Veolia's property rights and Veolia's ability to carry on its business. Under the guarantees of the Fifth Amendment to the United States Constitution, USEPA cannot take these actions and deprive Veolia of its protected interests "without due process of law." U.S. Const. amend. 5.

The authority USEPA invokes for the reopening is set forth in 40 C.F.R. § 71.7(f), which provides that:

> Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists, and shall be made as expeditiously as practicable.

40 C.F.R. § 71.7(f)(2). The procedures for "initial permit issuance" are included in Subsection 71.7(a) and in Subsection 71.11 and mirror those associated with the familiar "notice and comment rulemaking" under Section 553 of the Administrative Procedure Act. *See* 5 U.S.C § 553. While these procedures offer sufficient due process protection in most instances, they are inadequate as applied to Veolia under the circumstances of this reopening.

The Section 553 procedures are designed to ensure public participation in the Agency's decisionmaking and they offer protection at a level consummate with participation by any member of the general public. However, they are inadequate as applied to Veolia when the Agency is basing its permit decision on specific, unsubstantiated allegations regarding Veolia's compliance history. While Veolia has participated in the process through these comments and the public hearing, it has no opportunity under these procedures to engage in fact-finding or other discovery regarding the allegations being made against it. Veolia also has had no opportunity to conduct cross-examination or otherwise to test the evidence against it in the presence of a neutral fact-finder. Finally, although the procedures in 40 C.F.R. § 71.11 and Section 307(b) of the CAA contemplate an appeal to the appropriate United States Court of Appeals after USEPA makes its permitting decision (and appeals to the EAB are exhausted), this level of post-deprivation review will not provide Veolia with the fact-finding and cross-examination that is essential to due process in this instance.

Thus, USEPA's reopening is depriving Veolia of its due process rights as guaranteed by the U.S. Constitution, and, as a result, this permitting action is unconstitutional and invalid.

D. USEPA Showed Bad Faith and Failed to Follow Its Own Regulations in Considering Veolia's Application for Significant Modification

USEPA sets forth its version of the current permitting action on pages six and seven of the Statement of Basis:

> EPA issued a final Title V permit (Permit No. V-IL-1716300103-08-01) to Veolia on September 12, 2008, and the permit became effective on October 12, 2008. Prior to issuing the final permit, EPA reviewed historical metal feedrate data supplied by Veolia to support Veolia's proposed operating parameter limits (OPLs) for hazardous air pollutants required by the HWC MACT, 40 C.F.R. Part 63, Subpart EEE. EPA concluded that reliance on the OPLs submitted by Veolia would not assure Veolia's compliance with the applicable requirements in the HWC MACT. Specifically, EPA determined that the past data were not reliable for determining feedrate OPLs for mercury (Hg), semi-volatile metals (SVM) –

> lead (Pb) and cadmium (Cd), or low volatile metals (LVM) – arsenic (As), chromium (Cr) and beryllium (Be)).
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> Based upon EPA's review of Veolia's historical data, on February 22, 2008, EPA issued a Request for Information under Section 114 of the Act, 42 U.S.C. § 7414, requiring Veolia to complete comprehensive performance tests on all three combustion units. The required testing was limited to mercury, low volatile metals and semi-volatile metals.
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> Since the test results and the OPLs for mercury, SVM and LVM were not available at the time that EPA made the initial permit available for public comment, EPA provided the opportunity for the public to comment on the compliance schedule, Veolia's performance test plan, and the OPL calculation methodologies. EPA required Veolia to submit the results of its testing and a request for a significant modification to its Title V permit to incorporate OPLs by October 10, 2008.
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> Veolia conducted the comprehensive performance tests in August and September 2008. On October 10, 2008, Veolia submitted to EPA the August and September 2008 test results, and requested a significant modification to its Title V permit to incorporate OPLs for mercury, SVM and LVM, as specified in the compliance schedule. However, Veolia withdrew the significant modification application on December 13, 2012 after receiving notice from EPA that it intended to deny the application and to reopen the permit to add feedrate limits that EPA considered to be supported by the available performance test data. EPA has relied upon the August and September 2008 performance test results submitted by Veolia in establishing the feedrate limits proposed in this permitting action.

Statement of Basis at 6-7 (VES 000144-000145). However, contrary to the indications provided by USEPA, this permitting action arose—not by USEPA's desire to "assure compliance" or because Veolia suddenly withdrew its application for significant modification—but rather because of USEPA's failure to perform its responsibilities under the Clean Air Act, the Agency's failure to live up to its commitments to Veolia, and bad faith on the part of USEPA during the significant modification process.

As a result of USEPA's inaction and failure to perform its regulatory duties, Veolia's October 2008 Title V permit was issued without OPLs for mercury, SVMs and LVMs. (Veolia had established OPLs prior to October 2008 that were defined in the facility's NOC.) The Agency was forced to issue Veolia's Title V permit on October 12, 2008, under the terms of a settlement agreement that USEPA had entered into with the Sierra Club on or about June 11, 2008, even though the Agency knew the permitting process was not yet complete and that OPLs for mercury, SVMs, and LVMs were not ready. USEPA failed to do the work necessary to issue a complete permit by the negotiated deadline with the Sierra Club. Thus, the permit was issued in October of 2008 without OPLs for mercury, SVMs and LVMs and Veolia was forced to immediately begin the significant modification process in order to place those OPLs in the permit.

Veolia submitted its first application for significant modification on October 10, 2008, as directed by USEPA. Veolia's application, as required by USEPA, included the OPLs for mercury, SVMs, and LVMs that were left out of the Title V permit. *See* Sept. 12, 2008 Information Requests at VES 002713-002726. The OPLs included in the October 2008 application were based on the metals testing that Veolia undertook in August and September of 2008, again pursuant to the Agency's request. Further, the October 2008 application included a request to use extrapolation in calculating Veolia's feedrates; specifically, Veolia included an extrapolation methodology that USEPA Region 5 personnel provided to it in 2008. *See* Harris Aff. at VES 008387; *see also* VES 002754-002755.

Subsequently, Veolia submitted a revised, second application for significant modification to USEPA on or about January 6, 2009. VES 000918-000922. This revision lowered the OPLs for mercury, SVMs, and LVMs based on a revised calculation for the moisture content of the solid waste that was fed to the incinerator during the August and September 2008 metals testing. Veolia again used the extrapolation methodology USEPA provided to it in 2008.

On November 3, 2009, during a conference call with Veolia, USEPA requested that Veolia resubmit this second application with more restrictive OPLs for LVMs, SVMs, and mercury. In the discussions, USEPA and Veolia agreed that Veolia could use the same USEPA-provided extrapolation methodology it had previously used, but that Veolia would limit the extrapolation to a maximum of a low multiple of the performance test feedrates or 75% of the MACT emission standard, whichever was less. On February 25, 2010, Veolia submitted this third application for significant modification. VES 000930-000939. This February 2010 significant modification application included OPLs based on the revised extrapolation methodology that was discussed during the November 3, 2009, conference call. However, Veolia further limited the OPLs to a maximum of three times the amount of LVMs, SVMs, and mercury actually fed into the incinerator during the performance testing, even though these levels were below those that would be allowed under the extrapolation methodology provided by the Agency.

In light of Veolia's February 2010 third application, USEPA later requested that Veolia withdraw the first and second applications for significant modification, dated October 10, 2008, and January 6, 2009. Veolia obliged USEPA via correspondence dated May 12, 2010. Veolia's May 12, 2010 Letter at VES 000940-000941.

USEPA next contacted Veolia on February 27, 2012, six months after the 18 month deadline in 40 C.F.R. 71.7(a)(2) and ***two years after the submission of the February 2010 application***, to set up a conference call. That conference call was held on March 8, 2012. During that call, USEPA informed Veolia that the Agency was going to deny Veolia's application because of the extrapolation methodology that Veolia used, even though USEPA had provided that methodology and agreed to its use. Harris Aff. at VES 008387. Veolia and USEPA then discussed a schedule by which either Veolia would submit additional information, or the Agency would begin actions to deny the modification application.

Veolia responded to USEPA by email on March 27, 2012. Veolia's March 27, 2012 E-mail at VES 007568-007571. Veolia reiterated that it wanted to work with the Agency, but believed that the request by the USEPA to again revise the application—***for the fourth time***—was

unreasonable, particularly because Veolia had prepared the February 2010 submission in accordance with the agreement it had reached with USEPA in November of 2009.

At the Agency's request, Veolia submitted even more technical information to USEPA in June of 2012. *See* Veolia's June 2012 Submission at VES 008284-008287. Veolia received no other substantive communication from USEPA until November 29, 2012, when USEPA sent an email notifying Veolia that the Agency planned to deny the application. USEPA Nov. 29, 2012 Email at VES 001679-001680.

The modification process took place over four years, was very costly to Veolia, and did not achieve its objective of placing the OPLs in Veolia's Title V permit. The Part 71 regulations are clear that four years is well beyond the required deadline for USEPA to make a final decision regarding Veolia's application:

> (2) Except as provided under the initial transition plan provided for under § 71.4(i) or under 40 CFR part 72 or title V of the Act for the permitting of affected sources under the acid rain program, ***the permitting authority shall take final action on each permit application (including request for permit modification or renewal) within 18 months after receiving a complete application.***

40 C.F.R. § 71.7(a)(2) (emphasis supplied). USEPA exceeded its clear non-discretionary deadline for taking final action on Veolia's application for significant modification. This is true even based on the timing of the third application for significant modification submitted on February 25, 2010. Using the date of this third application as the most conservative approximate starting point of the 18-month period, USEPA had to make a final decision by the end of August of 2011 in order to comply with the regulation. The Agency failed to act within the 18-month period, violated the regulation, and prejudiced Veolia with the delay. The process has taken so long that Veolia must submit its application for renewal of its Title V permit only days after the public comment period closes on this reopening. For this reason alone, USEPA's reopening makes no sense and is a waste of resources. Veolia believes the permit renewal process is the most efficient and appropriate means in which to place the OPLs in its permit at this stage in the process after so much delay by USEPA.

Further, USEPA has not been forthright with Veolia concerning the Agency's calculation of OPLs based on the testing performed by Veolia in August and September of 2008. Along with its application for significant modification, Veolia submitted a NOC informing the Agency of the OPLs that Veolia was operating under after completing the performance tests. A few days after submitting its modification application and NOC, on October 14, 2008, Veolia placed a DOC in its operating record establishing the OPLs that Veolia was operating under. The OPLs in Veolia's DOC did not include any extrapolation. Subsequently, in November of 2008, Veolia placed a new DOC in its operating record further lowering the OPLs. Veolia did this again in March of 2010. Both times Veolia notified the Agency of the changes. Moreover, during this entire period, USEPA and Veolia were in discussions concerning the correct OPL values that should be derived from Veolia's 2008 performance tests and included in the Title V permit. On repeated occasions, Veolia asked USEPA to provide it with USEPA's OPL calculations that were derived from the spilt samples USEPA took during the 2008 testing. USEPA refused to provide Veolia with these calculations. However, instead of sharing the information with Veolia

in 2008 and allowing Veolia to evaluate the information and revise the OPLs, if needed, USEPA waited until August 24, 2012—nearly four years later—to serve Veolia with an FOV based on the Agency's own OPL calculations. The FOV alleged that Veolia had been using incorrect OPLs for mercury since 2008, a charge Veolia disputes. USEPA acted arbitrarily and capriciously by withholding information and failing to negotiate with Veolia in good faith concerning the application for significant modification.

Veolia did not withdraw its application for significant modification because it was notified that USEPA was going to deny its application. Rather, Veolia withdrew its application because the process had taken four years with no prospect of timely success (especially in light of the Agency's own delays in responding to previous applications) and it made no sense to pour more time, effort, and resources into a process that in a few short months would have to be repeated as a part of renewing the entire Title V permit. At one point in the process, USEPA failed to contact Veolia or move the modification forward for a period of ***24 months***. Then, when USEPA did finally get around to contacting Veolia, the Agency asked Veolia to revise and resubmit its significant permit application for the fourth time. Veolia refused but still submitted additional information after USEPA's request in hopes of resolving the issue. Yet, another six months passed with no activity after that submission. USEPA's arbitrary and capricious delay created uncertainty for Veolia, caused Veolia to expend unnecessary resources by having to resubmit its application multiple times, and ultimately caused the process to fail to accomplish the goal of establishing OPLs in Veolia's Title V permit. Further, USEPA's delay is not sufficient cause under 40 C.F.R. §71.7(f) to reopen Veolia's permit.

E. USEPA Is Arbitrarily and Capriciously Reopening Veolia's Title V Permit Less than One Month Before the Permit Renewal Process Must Begin

Veolia must submit a renewal application for its Title V permit on or before April 12, 2013. *See* 40 C.F.R. Section 71.5(a)(1)(iii). During the lifetime of its current permit, Veolia has never been out of compliance with Title V of the Act and its implementing regulations. Further, Veolia will conduct comprehensive performance testing as part of HWC MACT compliance in August and September of 2013. All of the revisions to the existing Title V permit that USEPA is seeking through the reopening process could be set forth in the new Title V permit in October 2013 which would have the benefit of Veolia's additional testing. USEPA's actions in reopening the existing Title V permit at this late date are unnecessary, a waste of time and resources, and arbitrary and capricious.

USEPA alleges in its Statement of Basis:

> In this permitting action, the US. Environmental Protection Agency is proposing to reopen the Title V permit for Veolia ES Technical Solutions, L.L.C. (Veolia or Permittee), pursuant to 40 C.F.R. §71.7(f)(iv), to incorporate heavy metal feed rate limits that EPA considers to be supported by available performance test data supplied by Veolia. This reopening is necessary to ensure that the permit assures compliance with Title V of the Act and its implementing regulations at 40 C.F.R. Part 71, and the National Emissions Standards for Hazardous Air Pollutants

> (NESHAP) from Hazardous Waste Combustors, 40 C.F.R. Part 63, Subpart EEE. EPA is proposing to supplement monitoring requirements to assure compliance with proposed feed rate limits.

Statement of Basis at 1 (VES 000139).

With less than six months remaining in the existing permit's lifespan, USEPA has admitted Veolia has never been found to be out of compliance with Title V of the Act and its implementing regulations in any action that has the force or effect of law. Statement of Basis at 6 (VES 000144).

The Agency has failed to consider that the Title V permit, which is the subject of the reopening and has been in place for well over four years, will expire in less than seven months—on October 12, 2013. Further, as part of compliance with the HWC MACT, Veolia will conduct performance testing in August and September of 2013. Under the HWC MACT Rule, Veolia will be required to use these test results to establish OPLs for its incinerators.

USEPA has not asserted any circumstance to justify urgency in this matter. Veolia first applied for its Title V permit on September 7, 1995. USEPA officially took over the permitting process from IEPA on September 29, 2006. Veolia was finally issued a Title V permit on September 12, 2008, however, the Agency allowed the OPLs for mercury, SVMs, and LVMs, that are at the core of this reopening, to be left blank and these OPLs have been blank for nearly 90% of the five-year permit's lifetime. VES 007297-007507.

Now, when the permit is about to expire and Veolia is shortly to begin testing to establish limits that will ensure the incinerators comply with HWC MACT emissions standards for its new Title V permit, USEPA seeks to reopen Veolia's Title V permit to allegedly "assure" compliance with the HWC MACT. However, through the reopening process, USEPA is not seeking to lower the OPLs for metals overall, rather it is *raising* the OPLs for *all* metals except mercury. Statement of Basis at 17 (VES 000155).

USEPA has no rational basis for the reopening and has failed to consider the imminent expiration of the current permit. Everything USEPA has proposed in the revised Draft Permit could be accomplished as part of the issuance of the new permit in October of 2013 with the attendant savings of both time and resources.

F. USEPA Has Arbitrarily and Capriciously Reached Two Different Permitting Decisions Based on the Same Facts

USEPA was aware of Veolia's location, various FOVs, the variability of Veolia's waste stream, and the 2007 risk screen when the Agency issued Veolia's Title V permit in 2008. These factors have not changed and, despite USEPA's representations, cannot serve as a basis to reopen and modify Veolia's permit.

In the Statement of Basis, USEPA states that "source-specific circumstances, including Veolia's compliance history, the variability of its feedstream, and its location in an area with significant environmental justice concerns" support reopening Veolia's Title V permit. Statement of Basis at 19 (VES 000157). However, USEPA knew of all of these source-specific circumstances at the

time the Agency issued the 2008 permit to Veolia and required Veolia to subsequently set feedrate limits for heavy metals through Veolia's Notification of Compliance. USEPA now seeks to use the same information the Agency relied upon when it issued the 2008 Title V permit as the basis to revise the permit.

Before it issued Veolia's 2008 Title V permit, USEPA issued FOVs against Veolia in 2006 and 2008. The Agency further issued a FOV to Veolia in 2012; however, the facts underlying the 2012 FOV are the same facts that USEPA relied on in the 2006 and 2008 FOVs that were never pursued. Further, the FAP criticized in the 2012 FOV is based on the waste analysis plan that has been a part of Veolia's RCRA permit since 1994.

Since 1994, the variability of Veolia's waste feed has never significantly changed. Likewise, Veolia's facility has not moved since it was first issued its Title V permit in 2008, and the social and economic demographics in the area have remained unchanged. Indeed, the Statement of Basis relies upon census data from 2000 in determining whether Veolia is located in an environmental justice area. Statement of Basis at 27 (VES 000165).

Similarly, in the Statement of Basis, USEPA states:

> To ensure compliance with the proposed feed rate limits, EPA has included in the Title V permit enhanced monitoring requirements for heavy metals (mercury, arsenic, beryllium, cadmium, chromium and lead). The enhanced monitoring requirements are based on site-specific conditions at the Veolia Facility and in the surrounding community. Previous site-specific dispersion modeling and risk assessment, conducted by EPA for purposed of RCRA permitting, showed that mercury emissions from the Veolia facility could result in deposition of mercury in and around lakes used for fishing downwind of the facility. The proposed enhanced mercury monitoring requirements will help protect human health and the environment from the consequences of mercury emissions by providing further assurance that the permitted mercury limits will not be exceeded.
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> To verify that Veolia's feedstream analysis procedures and the proposed feed rate limits are sufficient to assure continuous compliance with the HWC MACT limits, EPA is proposing that Veolia install and operate a multi-metals CEMS.

Statement of Basis at 28)(footnote omitted) (VES 000166). The quote refers to USEPA's 2007 Risk Screen and addendum. USEPA had the information from this 2007 Risk Screen and addendum at the time Veolia's Title V permit was issued in 2008.

USEPA clearly considered this evidence and must have believed it supported the issuance of Veolia's Title V permit in 2008—without inclusion of multi-metals CEMS and supplemental feedstream analysis requirements it now demands be included in the permit. USEPA is now citing the same evidence, which has not changed, to reopen and modify the permit it issued almost five years ago. It is arbitrary and capricious for USEPA to consider the same information today and arrive at a different permitting decision.

G. USEPA Failed to Analyze or Consider the Efficacy of Multi-Metals CEMS

USEPA failed to consider whether a multi-metals CEMS could be implemented at Veolia. Rather, the Agency simply accepted the representations of a company that has since abandoned the multi-metals CEMS technology. *See* Warchol Aff. at VES 008383. Veolia met with USEPA on September 18, 2012 in Chicago to discuss, among other issues, the August 2012 FOV. As part of these discussions, USEPA stated that it wanted for Veolia to install a CEMS to monitor Veolia's metals emissions. Veolia stated that Veolia already demonstrated compliance with emissions standards using the methods set forth in the HWC MACT—through Veolia's OPLs, FAP, and CPTs. These methods were approved by the Agency in Veolia's Title V permit and are the same methods used by every other commercial hazardous waste incinerator in Region 5. Further, Veolia told USEPA that multi-metals CEMS technology could not operate effectively in Veolia's incinerators due to high temperatures and high moisture content—up to 40%—in Veolia's stacks. Warchol Aff. at VES 008382.

USEPA responded by alleging, as set forth in its Statement of Basis at 24, that the Eli Lilly facility in Indiana successfully utilized the technology. Veolia replied that the incinerator at the former Eli Lilly location, which is now owned and operated by Evonik, was not a commercial hazardous waste incinerator since it only accepted a homogenous feedstream. Evonik Aff. at VES 007596 Further, Evonik removed the CEMS from service permanently in August, 2011 due to software and firmware problems. Evonik found the CEMS was costly in terms of time and maintenance and never relied on it for official monitoring purposes under the site's Title V permit. Evonik Aff. at VES 007596-007597. Veolia further explained that no commercial hazardous waste incinerator in the United States used multi-metals CEMS to monitor stack emissions and the technology simply could not successfully operate in the harsh conditions produced by Veolia's incinerators. Warchol Aff. at VES 008382.

Based on the evidence USEPA has included in the administrative record, it is plain that USEPA never evaluated Veolia's concerns. Rather, USEPA turned over the evaluation of multi-metals CEMS to commercial vendors with specific financial interests in the technology—Pall Corporation ("Pall") and Cooper Environmental Services ("Cooper"). Cooper developed the Xact multi-metals CEMS technology and Pall was the primary marketer of the Xact. At the time USEPA turned to Pall and Cooper, those companies stood to gain if USEPA required Veolia to install and operate a multi-metals CEMS. Pall has since abandoned the technology.

On September 19, 2012, the day after Veolia's meeting with USEPA and prior to Pall abandoning the technology (Warchol Aff. at VES 008383), Douglas Barth, Pall's Business Development Manager, wrote Jeff Ryan at USEPA—apparently in response to an earlier communication that USEPA failed to make a part of the administrative record—the following email:

> It looks like this effort will take some time and tact. I will be happy to guide you and R5 [Region 5] through the maze of information to build a scientifically defensible case for our XRF CEMS and on HWI [Hazardous Waste Incinerator].

> XRF looks like the education starting point for this effort. Hg CEMS are AF and Multi-Metals are XRF, those Hg CEMS references set no precedence here that section of the slate is clean.
>
> As for Eli Lilly Co. Rick Lambert is the correct contact. Rick funded the research starting in 1996 with Army to R&D the first EPA certified MM CEMS. He owned and operated the system for 6 years. I will forward his contact information to you.
>
> I will save the rest of my responses for our talk.

D. Barth Sept. 19 2012 Email at VES 001371.[21] As the quoted correspondence makes clear, USEPA abdicated its regulatory responsibility to independently evaluate the science and technology issues raised by Veolia and presented by the multi-metals CEMs. The Agency deferred to Pall—a party with which the Agency had no contractual relationship and a party with a vested interest in having the Agency require Veolia to install multi-metals CEMS—to guide the Agency "through the maze of information to build a scientifically defensible case" for USEPA to require Pall's CEMS be installed at Veolia as part of the reopening process. Barth and Pall knew Pall could benefit financially for performing what would otherwise be USEPA's regulatory function if Pall supported USEPA's decision to require Veolia to purchase Pall's CEMS, regardless of whether it actually worked. Pall had no incentive to scrutinize whether the CEMS would produce reliable data when applied to Veolia's incinerators.

Jeff Ryan, on behalf of USEPA, demonstrated the extent of USEPA's failure to adequately and independently analyze or consider the efficacy of multi-metals CEMS technology in Veolia's incinerators when he wrote to Barth on September 2012 and requested that Pall answer the two difficult questions Veolia raised at the September 18, 2012 meeting:

> Short story is I want to confirm/refute status of system at Lily and need to know whether you can operated @40% moisture. These are their [Veolia's] 2 majors points as why not. The Hg is a totally separate issue, and one we are well prepared for.

J. Ryan Sept. 20, 2012 Email at VES 001370. Interestingly, USEPA's email reflects a level of comfort (perhaps equally misguided) with a mercury CEMS ("one we are well prepared for") that it apparently lacks with regard to the multi-metals CEMS. This makes USEPA's

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[21] Veolia requests that USEPA disclose and add to the administrative record all communications pertaining to the Xact CEMS and identify and describe all financial interests any USEPA or other governmental employees may have at any time in the Xact CEMS or any company that is associated with the Xact CEMS. Additionally, the emails between USEPA and Pall show evidence of attachments that may or may not have been delivered and may not have been made a part of the administrative record. *See* VES 001373-001378. To the extent USEPA has such attachments or other documents from Pall, USEPA should make such information part of the administrative record in this matter. Further, Veolia requests that the public comment period be reopened following such additions.

abandonment of its role to independently analyze the multi-metals technology—a technology that USEPA apparently is not well prepared for but nevertheless demands Veolia install—all that more appalling.

Pall replied to Ryan's inquiry the same day by stating:

> Yes, we can operate in 40% moisture.

D. Barth Sept. 20, 2012 Email at VES 001370. On the basis of Pall's reply, the Statement of Basis provides:

> Eli Lilly's stack gases at the Tippecanoe facility averaged approximately 8 percent moisture content and 140 degree F° while the multi-metals CEMS was being operated. However, Pall Corporation has assured EPA that trial tests on its CEMS demonstrate that the unit can operate reliably at moisture contents above 40 percent.

Statement of Basis at 24 (VES 000162). The *only* information contained within the administrative record that USEPA produced that supports USEPA's statement that Pall's CEMS can operate in Veolia's 40% moisture environment is Pall's self-serving and unsupported comment (that makes no reference to any "trial tests") contained within Mr. Barth's September 20, 2012 email.

Pall has never inspected Veolia's incinerators. Warchol Aff. at VES 008382. USEPA has ignored the statements of Veolia, the experts in the operation of their incinerators, and instead has blindly relied on the statement by Pall, a stranger to Veolia's incinerators with a financial incentive to exaggerate the capabilities of the CEMS technology. However, based on a single unsupported statement that "yes, we can operate in 40% moisture" contained in an email from Pall, USEPA has instructed Veolia to expend millions of dollars to install a technology that Veolia believes will fail.

On September 26, 2012, Pall sent an email providing additional information to Jeff Ryan regarding multi-metals CEMS that shows both Pall's lack of objectivity and the Agency's abdication of its regulatory role:

> Jeff,
>
> Per your request for building a case why the Xact 640 Multi-Metals CEMS cannot be rejected from monitoring a HWI.

D. Barth Sept. 26, 2012 Email at VES 001368. USEPA was created for the purpose of protecting human health and the environment by writing and enforcing regulations based on laws passed by Congress. Here, USEPA deferred its own regulatory obligations to Pall. The administrative record contains no evidence that USEPA independently evaluated the "case" that it asked Pall to build to support requiring Veolia to install multi-metals CEMS. On this basis alone, USEPA's decision is clearly arbitrary and capricious.

Further undermining USEPA's position, as of February, 2013, Pall—the entity that USEPA relied upon for the technical information concerning the multi-metals CEMs set forth in the

Statement of Basis—has abandoned the multi-metals CEMS technology, is not offering the Xact CEMS for sale, and is no longer in the multi-metals CEMs business. Warchol Aff. at 008383.

Since the date that the public comment period opened, Pall has abandoned the multi-metals CEMS technology—USEPA should once again follow Pall's lead and do the same.

H. USEPA's Statement of Basis Fails to Provide Rational Evidentiary Support for the Draft Permit Conditions

USEPA proposes to modify Veolia's Title V permit by requiring the installation of a multi-metals CEMS and imposing new periodic monitoring requirements consisting of supplemental feedstream analysis procedures. However, USEPA has failed to provide adequate support for these proposed modifications. Veolia's specific comments on Section 4.0, Subsection (D) of the Draft Permit are set forth below.

1. *Veolia's Comments on Section 4.0, Subsection (D)(a) (Proposed Supplemental Feedstream Analysis Procedures)*

USEPA provided no plausible factual basis for modifications to the feedstream analysis plan set forth in Veolia's permit ("FAP"). The Agency's only attempt at justifying the revisions to the FAP may be found in the following paragraphs:

> 40 C.F.R. Section 63.1209(c) requires that a subject facility have a feedstream analysis plan (FAP) 'that is sufficient to document compliance with the applicable feedrate limits.' The plan must be submitted to EPA on request.
>
> EPA has reviewed Veolia's FAP and determined that it is necessary to supplement the mercury, LVM and SVM analysis procedures contained in the FAP in order to assure compliance with HWC MACT limits and the proposed feedrate limits. To address the identified deficiencies in Veolia's FAP and assure compliance with the operating parameter limits, EPA has specified mercury, LVM and SVM analysis procedures in the permit.
>
> . . . .
>
> The proposed feedstream analysis procedures, which are found in conditions 2.1(D)(1)(i) and 2.1(D)(4)(d)(2), supplement any other mercury, LVM and SVM analysis procedures specified in Veolia's FAP and supersede any less stringent provisions in the FAP. Incorporation of these requirements into the Title V permit does not eliminate Veolia's obligations to maintain an adequate FAP, consistent with 40 C.F.R. Section 63.1209(c); rather, we are specifying minimum feedstream analysis procedures to assure compliance with the applicable HWC MACT limits.

Statement of Basis at 20 & 21 (VES 000158-000159). USEPA uses the phrases "in order to assure compliance with HWC MACT" and "[t]o address the identified deficiencies in Veolia's FAP"; however, the Statement of Basis identifies no deficiencies in the FAP and provides no explanation of how Veolia's FAP is not sufficient to assure compliance with the applicable

feedrate limits. Rather, the proposed revisions are simply inserted into the permit without explanation.

Only a few months prior to the reopening, USEPA requested a complete review of Veolia's FAP. Charles Hall, a USEPA environmental engineer who works in the Air Enforcement and Compliance Assurance Section of the Air Enforcement and Compliance Assurance Branch, scrutinized Veolia's FAP and concluded that Veolia's current FAP complies with applicable regulations:

> Veolia's FAP literally has all of the elements that 40 C.F.R. Section 63.1209(c)(2)(i) through (vi) require.

See Charles Hall Memo., VES 001291-001294 at VES 0001293. After his detailed review—which was specifically intended to identify problems with Veolia's FAP—Mr. Hall found that Veolia's FAP complied with the HWC MACT requirements and found no deficiencies. *See id.* at VES 001293. Because USEPA has identified no deficiencies in Veolia's FAP, it has no justification for imposing the supplemental feedstream analysis procedures on Veolia—procedures that would impose significant time, resource, and cost burdens on Veolia by requiring that virtually all waste be analyzed for metals, even when there is no reason to believe metals are present. *See* Draft Permit Sec. 2.1(D)(4)(d)(2).

(i) Veolia's Comments on Section 2.1(D)(4)(d)(2) of the Draft Permit (Proposed Supplemental Feedstream Analysis Procedures)

The revised conditions in Section 2.1(D)(4)(d)(2) of the Draft Permit are based on the Agency's misunderstanding of the intent of the Waste Analysis Plan ("WAP") and FAP. Due to this lack of understanding, the Agency has created scenarios where waste would be required to be opened, sampled and analyzed multiple times, thus creating additional hazardous waste in direct conflict with RCRA's waste minimization policy and increasing health and safety risks. Also, because the Agency made assumptions rather than obtain technical information about the waste Veolia received at its facility, the vagueness of these conditions has created not only confusion, but also potential compliance issues for Veolia.

(a) *Veolia's Comments on the Pre-Acceptance Screening Procedures*

Veolia has nearly 12,000 active waste profiles. Some of these profiles are exempt from sampling and analysis under section 2.1 (D)(4)(d)(2)(vi) of the Draft Permit. However, there are still thousands of waste profiles that would be candidates for yearly sampling and analysis. Many of these profiles are never received at the facility. Generators have multiple approvals in place at multiple incinerators, so it is often the case that some approved waste streams are never received by Veolia.

With this background, the yearly sampling requirement is unmanageable, has no regulatory basis and provides no additional information for waste approval. The basis for the Profiling Procedure described in Veolia's WAP, Section 4.0 is "to determine the acceptability of specific wastes for management at the facility." As a result, generators are required to fill out a waste profile sheet describing the waste and provide a sample that is analyzed for the mandatory profiling

parameters of pH, radioactivity screen, PCBs, flash point and apparent viscosity. Supplemental analysis including metals analysis may be performed on the sample if required by the WAP, FAP, or Veolia's Policy on "Determination of Metal and Ash Values at TWI." The profile information, mandatory analysis and supplemental analysis are used by the Veolia technical manager/approval chemist to make a waste acceptance determination, as defined by the WAP. If the waste is approved, generators can then schedule the waste for incineration. When the waste is received at the facility, if it is not an exempt waste stream, it is sampled and analyzed for the required mandatory analysis. These analysis results are compared to the original profile and analytical information to ensure the waste is conforming. Metals analyses are a supplemental analysis as defined by the WAP and those analyses are conducted on every waste stream that meets the criteria of the WAP, FAP or Policy of "Determination of Metal and Ash Values at TWI."

Veolia's RCRA Part B Permit allows Veolia to receive and incinerate waste containing MACT metals. The concentration of the metals in these wastes is important for determining how much material can be fed to the incinerators in compliance with the permitted feedrate limits, but this concentration is determined when Veolia receives the wastes, not on the concentration determined in the pre-acceptance sample. As a result, the Agency's proposed requirement for yearly pre-acceptance analyses would provide no information in addition to what Veolia obtains when the waste arrives at the facility and is characterized. If metals analyses are required, then this waste would be analyzed for metals upon arrival and these concentrations would be used for determining feedrate limits for compliance with the defined permitted limits. Veolia does not rely on the data from pre-acceptance approval samples because the concentration of metals in the wastes that actually arrive for disposal could differ from the concentration in the sample that was provided during the pre-acceptance procedure.

(b) *Veolia's Comments on the Waste Acceptance Procedure*

The waste acceptance procedure requires that Veolia conduct representative sampling of each shipment of waste for mercury, SVM, and LVM within 24 hours of receipt. As Veolia has pointed out to IEPA and USEPA, this proposed deadline poses many safety and logistical concerns for the facility without providing any environmental benefits. First and foremost, Veolia has and will continue to sample and analyze all required waste coming into the facility and document the required analytical data before the waste is incinerated. There are no exemptions to this obligation because the BTU, chlorine, metals and ash concentrations (along with other process-specific analyses) are required prior to incineration. This process ensures that all the permit and regulatory conditions, along with permitted feedrates, are complied with and also ensures that the waste can be incinerated safely without employee injuries or operating upsets. As a result, all waste shipments will be sampled and analyzed and the results documented before the waste can be incinerated. However, due to many conditions and situations out of the facility's control, it would create an unsafe work environment to impose an arbitrary, overly short time limit for sampling and analysis. Currently, all waste is received at the facility via over-the-road trucks. Due to weather conditions, road closures, accidents, mechanical problems and other transportation issues, waste that is scheduled for a certain date may arrive early or late due to circumstances over which the facility has no control.

As a result of these circumstances, no trailers might arrive at the facility on one day, but the next day several might arrive. Also, if a waste comes into the facility and has not been approved, is

not scheduled, or has the wrong profile number or the wrong markings, then the facility must contact the generator of the waste to determine the waste's composition and correct any erroneous or missing information before the waste will be opened and sampled, all to ensure that the appropriate safety precautions are taken. This process can take several days, but it is critical to ensuring that Veolia has adequate knowledge so that Veolia employees wear the correct personal protective equipment and can safely sample and manage any problems they may encounter while sampling the waste. During this review, Veolia may also determine that the waste is exempt from sampling or, due to safety concerns, should not be sampled but should be rejected and sent back to the generator. Requiring a waste to be sampled in 24 hours would prevent these safety procedures from being implemented.

Veolia's policy is that unscheduled or late loads are brought into the facility, in order to avoid the drivers taking their loads to uncontrolled areas, such as a commercial parking lot, a hotel parking lot, or a public rest stop. Veolia's policy ensures that the waste is managed in the most prudent manner and poses no threat to human health or the environment. Since the facility is staffed 24 hours-a-day, these loads can be secured and if any issue arises, they can be managed safely. However, following this sensible policy makes it impossible to sample everything that comes into the facility within 24 hours. The safety of Veolia's employees and the public is Veolia's utmost concern. Veolia cannot put its employees and the public at risk by hurriedly sampling waste to meet USEPA's 24-hour requirement. Once the waste is onsite, drums are systematically unloaded into our receiving building that is equipped with secondary containment. The entire facility is inspected each day, so this waste would be included in the daily inspection. By following this protocol, the waste is secured, managed properly, and the safety of the public and Veolia's employees is protected.

Finally, an identical provision requiring Veolia to sample all waste within 24 hours of receipt is included in the RCRA Part B permit issued to Veolia on December 2, 2009 (the RCRA Part B permit is currently on appeal to the Illinois Pollution Control Board). On February 9, 2011, Veolia met with IEPA and USEPA to discuss this requirement and others subject to the permit appeal. IEPA asked that Veolia document these issues and its concerns with this condition and submit them to the agencies for review. On April 15, 2011, Veolia submitted comments, including comments on the 24 hour sampling requirement. On September 22, 2011, IEPA responded to this comment in a letter signed by Stephen Nightingale, Manager, Permit Section, Bureau of Land and stated:

> Veolia misinterprets the intent of the requirement to sample all incoming waste within 24-hours of receipt. Veolia must never rush to sample a waste where it would cause a safety issue, and Veolia must never sample wastes that are not approved. The intent of this requirement is to ensure that no wastes are accepted at the facility for incineration until they are sampled and analyzed. Your proposal states that currently all waste is received at the facility via over-the-road trucks. Due to weather conditions, road closures, etc. Waste [sic] that is scheduled for a certain date may arrive early or later due to circumstances of which the facility has no control. Also is [sic] a waste comes into the facility and is not approved, scheduled, has the wrong profile number or [sic] it or the wrong markings, the facility must contact the generator before you will open and

> sample the waste. You state that this can take several days. IEPA proposes that Veolia in these circumstances store these shipments in the over-the-road trucks in the permitted trailer storage pad until they can be sampled. The condition in the permit can be modified to reflect this change.

IEPA Sept, 22, 2011 Letter at VES 007175-007177 . Thus, Veolia has already addressed this issue with IEPA and USEPA and IEPA has agreed that this condition should be changed to reflect that waste must be sampled and analyzed before incineration but need not be sampled and analyzed within 24 hours of receipt.

(c) *Veolia's Comments on the Batch Sampling Procedure*

This condition is duplicative to sampling activities Veolia has in place. *See* Veolia's Standard Division Practice at VES 004352-004367. If Veolia were to implement this batch sampling procedure, certain waste received for processing, such as containers for decant or for consolidation, would be analyzed no less than three times between arrival of the waste at the facility and the time it is incinerated. Veolia believes it is unnecessary and imprecise to physically reanalyze waste after batching has been performed. Indeed, the Agency itself has stated a preference—as reflected in its Statement of Basis at page 17 and footnote 15—that calculations should be performed because they are more accurate. Consistent with USEPA's desire, Veolia believes that the more accurate practice is to analyze the most concentrated waste (at receipt) and then mathematically calculate the presence of metals as that concentrated waste is blended and/or added to other materials in a tank or drum. This protocol prevents erroneous results that sometime occur as a result of physically reanalyzing diluted samples from batches and blends.

Further, this condition, as written, does not fully address all the waste handling scenarios at the facility and as such causes unnecessary sampling and analysis. This unnecessary sampling and analysis is not only costly, but, by opening drums and sampling wastes multiple times, causes the generation of unnecessary hazardous waste (through the disposal of personal protective equipment and sampling equipment, as well as the generation of laboratory waste) that could be eliminated and puts workers at unnecessary risk. This unhelpful requirement should be withdrawn.

(d) *Veolia's Comments on Fuel Procedure*

It is unnecessary to create additional cost to sample and analyze fuels (on a yearly basis) where the concentrations of metals are known or when the product is unchanged. Every time a waste is sampled and analyzed additional waste is generated and safety risks are increased. As a result, Veolia requests that the Agency delete this requirement.

(e) *Veolia's Comments on Treatment of Detection Limits for Metal Feedrate Calculations*

(1) <u>(Comments on Subsection 1)</u>

Veolia will use the metal concentration measured that is above the detection limit for that applicable metal for the purpose of waste feed calculations.

(2) (Comments on Subsection 2)

In a meeting with IEPA and USEPA on February 9, 2011, Veolia discussed the reporting limit requirements. The Agency agreed that waste exempted from sampling would have the concentration defined as "0" instead of the MDL or EQL. Harris Aff. at VES 008389-008390. However, the requirements regarding sampling set forth in this subsection require Veolia to sample and analyze many waste streams where there are no documented metals contained in the waste.

In these instances, Veolia should be allowed to assign the waste a metal concentration of "0" for a number of reasons. First, the facility submits a TRI report yearly setting forth the total metals received, incinerated, emitted, and disposed. When Veolia knows that a given waste contains no metals based on generator knowledge or document research (e.g. MSDSs), it is nonsensical to demand that Veolia inaccurately inflate the TRI report by assuming that the waste contains metals at the detection limits. Moreover, doing so could falsely alarm the public and could potentially put the facility in the ethically untenable position of having to knowingly certify an inaccurate report. Second, assuming the presence of metals at the detection limits for these types of wastes, limits the amount of real metals the facility can incinerate by artificially inflating the feedrate numbers. This result puts Veolia at an unfair competitive disadvantage while doing nothing to protect the public health or the environment. Veolia should not be required to report metals emissions that do not exist; this could place Veolia's General Manager, in the untenable position of either having to unethically certify erroneous emissions reports or having the facility violate EPCRA's reporting requirements. Harris Aff. at VES 008389-008390.

(3) (Comments on Subsection 3)

Veolia does not utilize a 5-point linear calibration study multiplied by the appropriate extraction and dilution factors; rather, Veolia utilizes a 2-point calibration based on the manufacture's recommendation. The curve that Veolia utilizes is linear to infinity, however all samples have to fall within the limits of the highest standard. The dilutions have to fall within the highest standard within the curve for whatever metal is being analyzed. This procedure is pursuant to SW846 6010c and is recommended by the manufacturer. Manufacturer's Recommendation at VES 008967-008971.

Veolia believes that this permit condition should be modified to the procedure that is recommended by the manufacture of the ICP and meets standard procedure 6010c of SW846.

(4) (Comments on Subsection 4)

Veolia is already following the requirements for determining the mass of LVM and SVM as specified in the HWC MACT Rule. This condition should be deleted because it duplicates what is defined in the regulations.

(f) *Veolia's Comments on Exemptions to the Analysis Procedures in Condition 2.1(D)(4)(d)(2)*

Veolia objects to USEPA's attempt to have the packaging of the waste dictate what sampling is required.

Under RCRA, Veolia is required to develop and comply with a Waste Analysis Plan ("WAP") that dictates the sampling and analysis that must be performed on incoming waste. The WAP forms the basis for Veolia's current feedstream analysis plan. As proposed, the supplemental feedstream analysis provisions of the Draft Permit are inconsistent with and omit provisions of Veolia's WAP. As a result, the USEPA is improperly using Title V to modify the requirements of Veolia's RCRA Part B permit. Specifically, the Draft Permit has omitted exemptions currently in Veolia's WAP that provide that Veolia is not required to sample wastes that are "visually identifiable" through an inspection process, or wastes that may contain infectious materials. Veolia's Waste Analysis Plan §4.1.4(7) & (8) at VES 004396. For example, the visually identifiable exemption allows Veolia to incinerate items such as ammunition and explosives that it receives from local law enforcement agencies without sampling and putting Veolia's employees at risk of serious injury or death.

Further, as detailed in the comments above, the conditions of the Draft Permit do not fully address all the wastes that are acceptable at the facility. For example, off-specification, outdated pharmaceuticals and commercial products are exempt from sampling under this condition; however, such materials can also be packaged in large drums, gaylord boxes, or totes, which the proposed condition would require to be sampled. There is no rational basis for making this distinction. Veolia ensures that the metals concentrations of wastes are known, either through MSDSs, generator knowledge, or knowledge of the process generating the waste. The permit conditions as proposed will result in unnecessary sampling and analysis.

The additional requirement for written determination for the basis of the exemption included in Section 2.1(D)(4)(d)(2)(vi)(7) is a redundant exercise that merely causes the facility to produce additional documentation that already appears as part of the waste profile paperwork. Any regulatory agency can review the waste profile paperwork and see the decisionmaking process that was taken to sample and analyze the waste for metals or exempt the waste. These redundant requirements are not required by the regulations and are arbitrary and capricious.

The condition in Section 2.1(D)(4)(d)(2)(vi)(8) referencing "insufficient information" is so vague that the facility cannot determine whether the procedures employed are in compliance. This arbitrary and capricious requirement lacks a regulatory definition and puts the facility in a compromising compliance position.

A similar condition as that set forth in Section 2.1(D)(4)(d)(2)(vi)(9) appears in the facility's RCRA Part B Permit and has been ineffective in allowing the facility to respond in a timely manner to customer requests. Many times sampling a waste is impractical or impossible, but the waste does not fall within one of the defined exemptions. As a result, the facility must request approval from the Agency to refrain from sampling the waste. When this occurs, the Agency often fails to respond or approval is delayed such that public safety is potentially compromised. Veolia requests that the technical manager be given the approval responsibility for exempting the waste. The Agency can at any time review the decisionmaking process to ensure the regulations are being followed. This would prevent delays and allow Veolia to respond to customer needs.

Section 2.1(D)(4)(d)(2)(vi)(10) refers to "condition 2.1(D)(21)". The Draft Permit contains no such condition. Veolia requests that USEPA correct the error and reopen the permit for public comment following such correction.

2. *Veolia's Section by Section Comments on Section 4.0, Subsection (D)(b)-(d) (Proposed Multi-Metals CEMS)*

USEPA's substantive discussion of multi-metals CEMS technology begins in the Statement of Basis on page 21 under Section 4.0, Subsection (D)(b), entitled "Advantages of Using Multi-Metals CEMS," and ends on page 26. Veolia's specific comments on these provisions are as follows.

(i) *Section 4.0, Subsection (D)(b), pages 21-22:*

The introductory paragraphs describe the alleged challenges posed by feedstream analysis with regard to HWCs without citation to any authority or evidentiary support. Absent evidentiary support, USEPA's assertions cannot be validated or even evaluated.

While "EPA-approved CEMS" might in theory address the challenges presented by USEPA as being associated with feedstream analysis, multi-metals CEMS are not approved for use in the HWC MACT nor are they included in Title V or its implementing regulations. Moreover, the multi-metals CEMS technology has not been analyzed and verified by USEPA or sources regulated under the HWC MACT. Rather, as evidenced by the documents USEPA has placed in the administrative record, the only entities that claim to have vetted and verified the multi-metals CEMS are Cooper and Pall, both of whom have (or had) a pecuniary interest in its success.

USEPA states "modern multi metals CEMS have been shown to be more accurate and reliable than feedstream analysis for monitoring mercury and other hazardous metals emissions from combustion of heterogeneous waste streams." Statement of Basis at 22 (VES 000160). This statement has no support or evidentiary basis. Based on USEPA's statements, the only commercially-available multi-metals CEMS technology is the Xact CEMS, which uses reel to reel filter-tape sampling technology followed by x-ray fluorescence analysis for metals. However, the Xact CEMS at the former Eli Lilly location failed at the former Eli Lilly facility on a non-commercial hazardous waste incinerator due to software and firmware problems and was removed from service permanently in August, 2011 by Evonik, the owner of the facility. Evonik Aff. at VES 007596. During its operation, Evonik used the Xact CEMS in a very limited capacity, namely during RATA and performance testing only; found the Xact CEMS to be costly in terms of time and maintenance; and never relied on it for official monitoring purposes under the site's Title V permit. Evonik Aff. at VES 007596-007597. The Xact CEMS has not been identified as operating at any commercial hazardous waste incinerator to monitor stack emissions. Warchol Aff. at VES 008382; Fuchs Aff. at VES 007599-007600; Roberson Aff. at VES 008292; 008300. (To the extent the Statement of Basis references, in footnote 33, the fact that the U.S. Army installed and evaluated a multi-metals CEMS, the Statement of Basis fails to indicate whether the Army used a Xact CEMS or a different technology that is not currently commercially available and therefore not relevant.) Statement of Basis at 25. (VES 000163)

USEPA has made unwarranted assumptions with regard to the CEMS technology and has offered no evidence that it has independently substantiated any of the claims. In contrast, Veolia has offered evidence that the CEMS technology is not available technology for use in Veolia's incinerators and is costly in terms of time and maintenance through the comments and affidavits of Ralph Roberson with RMB Consulting & Research, Inc. (VES 008290-008380); Michael

Fuchs with URS Corporation (VES 007598-007605); Emma York with Evonik Industries (VES 007596-007597); and Dennis Warchol with Veolia (VES 008381-008383).

(ii) *Section 4.0, Subsection (D)(c), paragraph 1, page 21:*

Paragraph 1 contains three principal assertions: 1) multi-metals CEMS are commercially available; 2) they have been demonstrated to be reliable; and 3) the multi-metals CEMS will allow Veolia to measure compliance in "real time." These assertions are not supported by the facts. Pall, identified by USEPA as the primary marketer of the multi-metals CEMS technology (as set forth in the Statement of Basis at 23 & 25 (VES 000161 and 000163), has abandoned the multi-metals CEMS technology. In addition, as stated above, the Xact CEMS failed at the former Eli Lilly facility on a non-commercial hazardous waste incinerator due to software and firmware problems and was removed from service permanently in August, 2011 by Evonik, the owner of the facility. Evonik Aff. at VES 007596. During its operation, Evonik used the Xact CEMS in a very limited capacity, namely during RATA and performance testing only; found the Xact CEMS to be costly in terms of time and maintenance; and never relied on it for official monitoring purposes under the site's Title V permit. Evonik Aff. at VES 007596-007597. The Xact CEMS has not been identified as operating at any commercial hazardous waste incinerator to monitor stack emissions. Warchol Aff. at VES 008382; Fuchs Aff. at VES 007599-007600; Roberson Aff. at VES 008292; 008300.

The HWC MACT emissions limitations for mercury, SVMs, and LVMs were established using USEPA Method 29—periodic stack testing. To demonstrate compliance with these emissions limitations, a source must utilize Method 29 during performance testing *or* use an alternative monitoring technology. The source may only use an alternative monitoring technology if the source provides evidence for its approval and the technology is ultimately approved by the Agency. Veolia has demonstrated compliance using Method 29. Further, Veolia has not petitioned the Agency to use any alternative monitoring technologies and the USEPA has not approved any such technologies for use at Veolia's facility. Thus, Method 29 remains the only approved method for Veolia to demonstrate compliance with the HWC MACT emissions limitations. USEPA is arbitrarily and capriciously requiring Veolia to use an alternative method that is not approved under the HWC MACT. Further, USEPA has no authority to require Veolia to use an alternative monitoring technology that Veolia has not requested.

Finally, USEPA has promulgated no performance specifications for the multi-metals CEMS, and therefore the multi-metals CEMS cannot be used to measure compliance.

(iii) *Section 4.0, Subsection (D)(c), paragraph 2, pages 22-23:*

The Statement of Basis states: "EPA has approved the use of multi-metals CEMS as alternative monitoring methodologies at hazardous waste combustors." Statement of Basis at 22 (VES 000160). Pursuant to 40 C.F.R. 63.7(f), an affected facility may petition USEPA to use an alternative test method to any test method specified in a relevant emission standard. USEPA failed to consider that no multi-metals CEMS is actually used as an alternative monitoring methodology for purposes of demonstrating compliance at any commercial hazardous waste incinerator. Warchol Aff. at 008382; Fuchs Aff. at VES 007599-007600; Roberson Aff. at VES 008292.

The next sentence states "EPA has performed side-by-side evaluations of multi-metals CEMS with EPA Method 29 ... at industrial waste incinerators and found good correlation between the two methods." As a reference for this statement, USEPA cites to 75 Fed. Reg. 31,962 (June 4, 2010). The quote used in the Statement of Basis is copied directly from the *Federal Register*. Unfortunately, the *Federal Register* excerpt appears in the preamble to a proposed rule and cannot be verified because it contains no reference or documentation.

The third sentence of paragraph 2 states that performance specifications and quality assurance procedures are available for multi-metals CEMS, citing certain performance specifications referenced in footnote 24. In fact, USEPA has never promulgated performance specifications or the requisite ongoing quality assurance ("QA") procedures for multi-metals CEMS. Roberson Aff. at VES 008296-008297. The performance specifications and QA procedures USEPA alludes to were proposed in 1996, but have never been issued as a final rule. No commercial hazardous waste incinerator has installed a multi-metals CEMS to demonstrate compliance with metal emissions, and USEPA has established no performance specifications for evaluating the performance of a multi-metals CEMS. Roberson Aff. at VES 008292; 008296-008297.

The fourth sentence of paragraph 2 states, "EPA has published performance specifications and QA procedures for... multi-metals CEMS" as OTM 16 and OTM 20. USEPA has never promulgated or approved these specifications and procedures; rather, the two documents are simply posted on an EPA website entitled "Technology Transfer Network Emission Monitoring Center" under "Category C: Other Methods." Both documents have cover pages stamped "DRAFT" and are dated June 2005. More importantly, neither document was authored by USEPA, but rather both were authored by Cooper, which has a financial interest in portraying the performance specifications as legitimate. The USEPA website contains the following lengthy caveat that governs documents such as these:

> Category C: Other Methods
>
> This category includes test methods which have not yet been subject to the Federal rulemaking process. Each of these methods, as well as the available technical documentation supporting them, have been reviewed by the Emission Measurement Center staff and have been found to be potentially useful to the emission measurement community. The types of technical information reviewed include field and laboratory validation studies; results of collaborative testing; articles from peer-reviewed journals; peer-review comments; and quality assurance (QA) and quality control (QC) procedures in the method itself. A table summarizing the available technical information for each method can be found at the link below. The EPA strongly encourages the submission of additional supporting field and laboratory data as well as comments in regard to these methods.
>
> These methods may be considered for use in Federally enforceable State and local programs (e.g., Title V permits, State Implementation Plans (SIP)) provided they are subject to an EPA Regional SIP approval process or permit veto opportunity and public notice with the opportunity for comment. The methods may also be considered to be candidates to be

> alternative methods to meet Federal requirements under 40 CFR Parts 60, 61, and 63. However, they must be approved as alternatives under 60.8, 61.13, or 63.7(f) before a source may use them for this purpose. Consideration of a method's applicability for a particular purpose should be based on the stated applicability as well as the supporting technical information outlined in the table. The methods are available for application without EPA oversight for other non-EPA program uses including state permitting programs and scientific and engineering applications.
>
> As many of these methods are submitted by parties outside the Agency, the EPA staff may not necessarily be the technical experts on these methods. Therefore, technical support from EPA for these methods is limited, but the table contains contact information for the developers so that you may contact them directly. Also, be aware that these methods are subject to change based on the review of additional validation studies or on public comment as a part of adoption as a Federal test method, the Title V permitting process, or inclusion in a SIP.

USEPA, Technology Transfer Network, Test Methods at www.epa.gov/ttn/emc/tmethods.html., VES 007561- 007563. Thus, USEPA admits that it may not be "the technical experts on these methods" and that these methods have not been subject to the federal rulemaking process and are subject to change based on additional studies or public comment.

The fifth sentence of paragraph 2 of Section 4.0(d)(c) states:

> [m]oreover, multi-metals CEMS are an accepted option for metals emission compliance in the recently promulgated mercury and air toxics (MATS) rule. 77 Fed. Reg. 9303 (February 16, 2012). Therefore, the multi-metals CEMS has been proven to be reliable for measuring actual emissions of HAP metals from a hazardous waste combustor such as Veolia.

Statement of Basis at 23 (VES 000161). Also see footnote 33, which states in relevant part, "multi-metals CEMS are an accepted option for metals emission compliance in the utility mercury and air toxics (MATS) rule that was recently promulgated by EPA." Statement of Basis at 24 (VES 000162). The MATS rule does not contain the phrase "multi-metals CEMS" anywhere in either the regulatory language or in the preamble. The MATS rule establishes mercury and non-mercury metals emissions limits for coal- and oil-fired Electric Generating Units ("EGUs"). For non-mercury metals, an affected unit may elect to demonstrate compliance with a surrogate—filterable particulate matter ("PM"). Alternatively, an affected unit may elect to comply with the specific, non-mercury metals emission limits. However, the <u>approved</u> compliance options for non-mercury metals are: (1) conduct quarterly stack test using USEPA's manual, multi-metals test method (Method 29), or (2) install and operate a PM continuous parameter monitoring system (CPMS). Roberson Aff. at VES 008298.

The MATS rule does state that an affected facility may comply with the metal HAP emission limits using a CEMS approved in accordance with § 63.7(f) as an alternative to the test methods specified in the MATS rule.[22] Assuming that a "HAP metals CEMS" is functionally equivalent to a "multi-metals CEMS," under the rule, a facility that wishes to use that alternative has the burden of selecting the CEMS, and developing the site-specific testing procedures. The MATS rule contains no performance specifications for the HAP metals CEMS, despite the fact that OTM 16 and OTM 20 existed at the time the MATS rule was issued. The MATS rule states that an affected facility may petition the Administrator to use a HAP metals CEMS as an alternative method. However, the Agency's assertion in the Statement of Basis that a regulated entity's ability to petition USEPA to use a HAP metals CEMS as an alternative method means that a multi-metals CEMS has been proven to be reliable for measuring actual emissions from a hazardous waste combustor such as Veolia is unjustifiable and misleading. This provision of the MATS rule establishes that multi-metals CEMS is not a commercially available and is not a demonstrated alternative that USEPA can require without evidence that it is proven to be reliable for measuring actual emissions from a hazardous waste combustor.

USEPA failed to consider that a multi-metals CEMS is only an acceptable option for metals emission compliance in the MATS rule "if approved as part of an alternative monitoring request." *See* 77 Fed. Reg. 9,304, 9,386. Virtually anything can be used as an acceptable option to demonstrate compliance if approved—it is the approval, not the consideration, that demonstrates whether the technology is acceptable. Roberson Aff. at VES 008299. USEPA has not promulgated performance specifications or ongoing quality assurance or quality control procedures for multi-metals CEMS. Absent such specifications and procedures, the performance of a multi-metals CEMS cannot be evaluated and results produced by a multi-metals CEMS such as the Xact Multi-Metals CEMS cannot be relied upon to accurately measure emissions from an incinerator. Roberson Aff. at VES 008295.

Not surprisingly, USEPA provides no citation to support its statement in the last sentence of paragraph 2 that multi-metals CEMS has been proven to be reliable for measuring actual emissions of HAP metals from a hazardous waste combustor. The fact is that multi-metals CEMS have not been proven to be reliable in daily use at a commercial hazardous waste incinerator such as Veolia.

(iv) *Section 4.0, Subsection (D)(c), paragraph 3, page 23:*

The first sentence of this paragraph states, without substantiation, that "EPA recently evaluated, at several facilities, a commercial version of a multi-metals CEMS capable of measuring up to 20 or more HAP metals in real time." The statement fails to identify the facilities or type(s) of facilities, the test conditions (including whether the tests were conducted in commercial hazardous incinerators), whether the version evaluated is the same as the version USEPA discusses throughout the rest of the Statement of Basis, whether the version evaluated in fact

[22] 77 Fed. Reg. 9478 (Feb. 16, 2012).

measured 20 or more HAP metals in real time, and what the results of that evaluation were. Absent such information, the sentence provides no support to the Statement of Basis discussion.

The remainder of the third paragraph relies upon materials that Cooper or Pall developed or contributed to as support for the statements contained therein. *See* Statement of Basis at 23-24 & nn.26-29 (VES 000161-000166). USEPA fails to consider Cooper's or Pall's vested interest in reporting that the CEMS was a success. USEPA has offered no evidence that USEPA independently verified the claims made by these entities.

(v) *Section 4.0, Subsection (D)(c), paragraph 4, page 24:*

The fourth paragraph reflects USEPA's continued failure to independently evaluate the Xact multi-metals CEMS:

> Cooper Environmental Services has also developed and received EPA approval for a Quantitative Aerosol Generator (QAG), which generates a reference aerosol for calibrating the multi-metals CEMS and for performing relative accuracy test audits (RATAs) of the multi-metals CEMS. Yanca *et al.* evaluated both the Xact and the QAG using a modified EPA Method 301 at a hazardous waste combustor by comparing measured and reference aerosol concentrations. The authors found that both the Xact and the QAG met the Method 301 validation criteria with precisions and accuracies on the order of 5 percent over a wide range of concentrations.

Statement of Basis at 24 (footnotes omitted). USEPA fails to cite to any independent verification of the QAG. Historically, a group of companies have designed, developed and marketed CEMS (e.g., Thermo Fisher, Monitor Labs, California Analytics, etc.). Another completely independent group of companies have manufactured and supplied the market with calibration gases (e.g., Air Liquide, Airgas, Linde, etc.). Roberson Aff. at VES 008295. In the present case, USEPA failed to consider problems that may arise due to the close relationship between Cooper, the developer, and Pall, the licensed supplier of Cooper's technology, which provided both the available performance specifications and the calibration materials. USEPA has instructed Veolia to purchase and install the multi-metals Xact CEMS sold by Pall, use the draft performance specifications written by Cooper to determine whether the CEMS operates accurately, and calibrate the CEMS to determine accuracy by using materials supplied by Pall. USEPA's total reliance on Cooper and Pall is not appropriate—specifically in light of the undeveloped state of the multi-metals CEMS technology and its questionable accuracy—because Cooper and Pall both have pecuniary incentives to represent the technology had capabilities beyond it limits. Without other companies' participation, no independent means exist to establish that the Xact CEMS produces accurate and reliable data for compliance.

Further, the references USEPA provides in paragraph 4 and in footnotes 30 and 31 also show the Agency's failure to consider Cooper's or Pall's vested interest in reporting that the CEMS was a success. USEPA has offered no evidence that USEPA independently tested the assertions it repeats from these sources.

(vi) *Section 4.0, Subsection (D)(c), paragraph 5, page 24:*

The fifth and sixth paragraphs discuss the Xact multi-metals CEMS at the former Eli Lilly and Company location ("Lilly Incinerator") which is now operated by Evonik Industries. USEPA failed to consider the differences between the Lilly Incinerator and Veolia's incinerators. An obvious difference is that when Evonik operated the incinerator, it was not a commercial hazardous waste incinerator like Veolia's. Evonik Aff. at VES 007596. Veolia's incinerators, and commercial hazardous waste incinerators like Veolia's, receive widely diverse waste streams from unrelated industries which, USEPA recognizes, results in a heterogeneous waste stream. Statement of Basis at 25 (VES 000163). Due to the variety of feedstreams Veolia accepts, the significant variance in metals content would likely affect the ability of multi-metals CEMS to produce valid data over an extended period. Fuchs Aff. at VES 007600.

Further, most incinerators, including the Eli Lilly incinerator, employ wet scrubbers or a combination of wet scrubbers and baghouses as their pollution control equipment. The off gases from incinerators using wet scrubbers have similar moisture and temperature ranges. The suppliers of the Xact Multi-Metals CEMS claim that the Xact analyzes the off gas emitted from an incinerator to determine the amount of metals in the emissions stream. Unlike wet scrubber systems such as that employed by the Lilly Incinerator, Veolia operates a dry pollution control system on Units 2, 3 and 4 of its Sauget facility. To Veolia's knowledge, only one other exclusively dry system operates in the United States and that is at the Clean Harbors incinerator in Kimball, Nebraska. Veolia's dry pollution control systems operate at much higher moisture and temperature ranges than wet scrubber systems. USEPA offers no documentation demonstrating that the Xact Multi-Metals CEMS has successfully operated in the high moisture and high temperature environment presented by Unit 3 and Veolia's other incinerators. Warchol Aff. at 008381-008382.

Rather, the facts establish that the multi-metal CEMs is costly in terms of time and maintenance and that its software and firmware failed in the comparatively more friendly non-commercial hazardous waste environment involving a homogenous feed stream. The Xact CEMS has never been proven to be reliable in measuring actual emissions of HAP metals in a commercial hazardous waste environment involving a heterogenous feed stream such as Veolia. Fuchs Aff. at VES 007599-007601; Evonik Aff. at VES 007596; Warchol Aff. at 008382; Roberson Aff. at VES 008290-008302.

Evonik acquired the Eli Lilly facility on January 1, 2010 as part of an asset purchase. At the time of the acquisition, a Cooper/Pall multi-metal CEMS unit existed on the Lilly Incinerator. Evonik learned that Eli Lilly only operated the Cooper/Pall CEMS "intermittently for approximately six months following original installation in 2004 [and] [i]n the years following the original installation, the CEMS experienced frequent maintenance issues." Evonik Aff. at VES 007596. In 2005, Eli Lilly ceased using the CEMS during normal daily operations to measure emissions from the incinerator. Evonik Aff. at VES 007596. When Evonik acquired the facility, Evonik operated the CEMS in a very limited capacity, namely during RATA and performance testing only. Evonik removed the CEMS from service permanently in August, 2011 due to software and firmware problems. The facility's experience with the CEMS was that the CEMS was costly in terms of time and maintenance and since purchasing the facility in 2010, Evonik never relied on the multi-metals CEMS for official monitoring purposes under the site's Title V permit. Evonik Aff. at 007596-007597.

Unfortunately, USEPA erroneously believed that the Xact multi-metals CEMS had been used during normal daily operations since 2005 when, in fact, the opposite was true. USEPA's mistaken belief that the Xact multi-metals CEMS continuously operated since 2005 at the Evonik facility without problems is evidenced by the June 18, 2012, memorandum prepared by USEPA Environmental Engineer Charlie Hall:

> In the 16 years since EPA proposed the requirement to install mercury and PM CEMS, the technology for PM and mercury CEMS has improved and can answer the original criticisms regarding the availability and reliability of PM and mercury CEMS. On January 27, 2006 EPA approved Eli Lilly's proposal to install and operate CEMS for metals, PM, and HCL to directly install and operate CEMS for metals, PM, and HCL to directly demonstrate continuous compliance with the HWC MACT's mercury, SVM, LVM, PM and HCL/CL emission standards. Eli Lilly did not and Evonik Degussa, its successor at the Lafayette, Indiana, facility, has not reported operating problems with the multimetal, PM and HCL CEMS. Consequently, we believe that the installation and operation of multi-metal, PM and HCL CEMS at Veolia is a viable option.

Id. at VES 001293. At the time Hall wrote his memorandum, the reason Evonik never reported operating problems with the Xact CEMS is because since 2005 it was not used during normal daily operations to measure emissions from the incinerator. Rather, the CEMS was used only for short periods of time during testing or audits. When Evonik did use the CEMS, it was costly in terms of time and maintenance, and Evonik ultimately removed it from service permanently in August, 2011 due to software and firmware problems. Evonik Aff. at VES 007596-007597. USEPA knew the CEMS was no longer operating at Evonik at the time it drafted the Statement of Basis, but failed to mention this important fact in the Statement of Basis.[23] Statement of Basis at 24(VES 001470). Evonik never used the CEMS for official monitoring purposes under the site's Title V permit. Evonik Aff. at VES 007597. Consequently, USEPA's belief that the installation and operations of multi-metal CEMs at Veolia is a viable option based upon the Evonik's experience is erroneous.

Footnote 33, cited in paragraph 5, further reflects USEPA's misunderstanding that the Xact technology has been successfully employed by others. In fact, the evidence does not support the Agency's assertion. USEPA states that the U.S. Department of Defense has purchased three Xact units for use at army munitions incinerators. Statement of Basis at 24, nn.33 (VES

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[23] On October 4, 2012, USEPA's Sarah Marshall sent an email to other USEPA staff discussing Evonik's experience with the multi-metals CEMS and indicating that further discussions directly with Evonik would occur. *See* Marshall's email at VES 001470. However, no documents are contained within the administrative record reflecting the content of those subsequent discussions. Veolia requests that USEPA disclose and add to the administrative record all communications with Evonik pertaining to the CEMS. Further, Veolia requests that the public comment period be reopened following such additions.

000162). In fact, the Army is not using two of the three Xact units at all in normal operations, much less for compliance purposes. Fuchs Aff. at VES 007601-007602.

Recently, Pall has failed to return Veolia's numerous phone calls inquiring about the multi-metals CEMs. Cooper Environmental Services contacted Veolia and informed Veolia that Pall had exited the multi-metals CEMs business. Pall, the only company identified in the Statement of Basis by USEPA as being the marketer of the multi-metals CEMs, has abandoned the technology. Statement of Basis at 23 (VES 000161); Warchol Aff. at 008383.

Before Pall abandoned the multi-metals CEMS, Veolia contacted Douglas Barth, Pall's Business Development Manager, to discuss the multi-metals CEMS. In conversations with Veolia, Pall claimed that the Xact CEMS is one-of-a-kind and the only multi-metals CEMS manufactured in the United States. Pall alleged that in addition to the Eli Lilly CEMS, only four other multi-metals CEMS had been purchased. Each of these CEMS had been purchased by the government or quasi-governmental agencies—three by the Army and one by the Corps of Engineers. Pall admitted that these units are likely no longer in operation since Pall, the primary manufacturer of the equipment, had not recently sold any of the single use tapes that are necessary to operate the machines. Further, the three CEMS purchased by the Army were never certified, to Pall's knowledge, and have never been used for compliance purposes. Warchol Aff. at VES 008382; Fuchs Aff. at VES 007601-007602.

(vii) *Section 4.0, Subsection (D)(c), paragraph 6, page 24:*

The Statement of Basis states:

> Eli Lilly's stack gases at the Tippecanoe facility averaged approximately 8 percent moisture content and 140 degree F while the multi-metals CEMS was being operated. However, Pall Corporation has assured EPA that trial tests on its CEMS demonstrate that the unit can operate reliably at moisture contents above 40 percent.

Statement of Basis at 24 (VES 000162). The only document in the record produced by USEPA to support this statement is one email exchanged between Pall and USEPA. *See* VES 001370. Once again, USEPA failed to consider the fact that Pall, which manufactures the multi-metals CEMS, has a financial interest to overstate the CEMS capabilities. No data or objective evidence exist in the record to demonstrate the Xact multi-metals CEMS can operate at moisture contents at or above 40 percent. Warchol Aff. at VES 008382.

(viii) *Section 4.0, Subsection (D)(c), paragraph 7, page 25:*

The seventh paragraph discusses the use of the multi-metals CEMS technology in ambient fenceline monitoring. Statement of Basis at 25 (VES 000163). In this discussion, USEPA failed to consider that use of the multi-metals CEMS in fenceline technology is different than use of multi-metals CEMS to monitor emissions from the stacks at Veolia. It is not at all clear that a sample transport system for a multi-metals CEMs, as applied to Veolia's stacks, could be uniquely developed and designed to actually make the CEMS functional. In addition, fenceline monitoring monitors ambient air and is not designed to operate in the harsh high temperature,

high moisture, and constantly changing environment which exists in the stacks. Fenceline ambient air monitoring is inapplicable to the evaluation of stack emissions monitoring.

(ix) *Section 4.0, Subsection (D)(c), paragraph 8, page 25:*

In the last paragraph of subsection (c), USEPA makes it clear that the only multi-metals CEMS technology it considers to be commercially available is the technology in the Xact multi-metals CEMS. USEPA failed to consider that this technology lacks performance specifications and ongoing quality assurance or quality control procedures for measuring whether the technology was operating correctly and that Pall has now abandoned the technology. Roberson Aff. at VES 008290-008302; Warchol Aff. at VES 008383. USEPA also failed to consider that USEPA, through its exclusive reliance on Cooper/Pall, may have been misled as to the technology's abilities and its capabilities to function in the environment of Veolia's incinerators. Further, USEPA failed to consider that USEPA demeans its independent status by advocating on behalf of the Xact CEMS and reduces the incentive for technical advancement while also prejudicing Veolia's rights as a consumer. If Veolia's permit were modified as proposed, in theory, Cooper/Pall could charge Veolia any price it wishes for the Xact multi-metals CEMS. Roberson Aff. at 008290-008302.

(x) *Section 4.0, Subsection (D)(d), page 25:*

USEPA concludes that: "The use of a multi-metals CEMS is the only sure way to verify that Veolia's feedstream analysis procedures and the proposed feedrate limits are sufficient to assure continuous compliance with the HWC MACT limits." Statement of Basis at 25 (VES 000163). Veolia recognizes the emissions monitoring hierarchy set forth by USEPA that places accurate and reliable CEMS as the top choice for monitoring HAP emissions. *See* 64 Fed. Reg. 52,919 (Sept. 30, 1999). However, the Agency's ultimate conclusion assumes that the multi-metals CEMS technology can provide the accurate and reliable data contemplated by this hierarchy. In fact, it cannot. In instances when a CEMS is not available to directly monitor the emissions, the hierarchy dictates that monitoring be accomplished by either using a CEMS to monitor a surrogate for the emissions, or requiring emissions testing (i.e., comprehensive performance tests) and site-specific operating parameters (i.e., OPLs). *See id.* Both the current state of CEMS technology with regard to multi-metals monitoring and the HWC MACT dictate that sources subject to the HWC MACT rule use CPTs and OPLs.

Veolia and USEPA are in agreement on a point that regulators have denied in the past—that Unit 3 is "nearly identical" to Unit 2 and, going forward, the results of testing at either Unit 2 or Unit 3 should apply to both units. *Compare* VES 007533-007536 *with* Statement of Basis at 25 n.35 (VES 000163). Veolia also agrees with USEPA that Unit 4's carbon injection control system makes it difficult to compare Unit 4's emissions to those of the other units. However, Veolia disagrees with the arbitrary 12-month monitoring period selected by USEPA and the Agency has provided no rational basis or justification for this period.

I. USEPA's Justification for the Multi-Metals CEMS Is Implausible and the Agency Has Improperly Modified the Process for Alternative Monitoring

Absent a petition and further proof, the regulations recognize OPLs and a feedstream analysis plan ("FAP") as the primary means to verify compliance with the HWC MACT. In the proposed

permit, USEPA requires the use of a non-recognized means (i.e. a multi-metals CEMS) to verify a recognized means of compliance (the OPLS and FAP).

All commercial hazardous waste incinerators in Region 5, including Veolia, demonstrate compliance with HWC MACT through FAPs, OPLs, and stack testing. None of the commercial hazardous waste incinerators in Region 5 have multi-metals CEMS. Roberson Aff. at VES 008292. USEPA acknowledged that no commercial hazardous waste incinerators have installed CEMS to measure HAP metals by stating "[s]omeone has to be first" when Veolia questioned the feasibility of whether the CEMS technology on a hazardous waste incinerator and the impact such technology would have on Veolia if Veolia was the only entity in the industry forced to install such experimental technology. Warchol Aff. at VES 008382.

Under the HWC MACT rule, hazardous waste incinerators such as Veolia must conduct comprehensive performance tests (40 C.F.R. § 63.1207(b)) to establish OPLs, must analyze the feedstream prior to feeding the material into the incinerator and document the amount of mercury, semi-volatile metals (lead and cadmium) and low-volatile metals (arsenic, beryllium, chromium) in each feedstream (40 C.F.R. 63.1209(c)). Pursuant to the HWC MACT, Veolia is given the choice either to document compliance with the OPLs <u>or</u> petition USEPA to install and operate a CEMS to directly measure emissions. Veolia has chosen to document compliance with the OPLs. Section 63.1209(c) of 40 C.F.R. requires that a subject facility must have a FAP "that is sufficient to document compliance with the applicable feed rate limits." The plan must be submitted to USEPA on request. Veolia has documented its compliance consistent with the regulations. In fact, as USEPA stated in its June 18, 2012 memorandum, "Veolia's FAP literally has all of the elements that 40 C.F.R. Section 63.1209(c)(2)(i) through (vi) require."

In reopening the Veolia permit, USEPA proposes an increase of all metals OPLs with the exception of mercury, while also substantially increasing analyses under the FAP. Statement of Basis at 17, 20-21 (VES 000155; VES 000159-000160). Despite these efforts, USEPA claims to be concerned about metal emissions and, due to this concern, attempts to justify the installation of a multi-metals CEMS. However, USEPA's proposed permit modification are inconsistent with its stated concern about Veolia's metal emissions. If USEPA believed Veolia's metal emissions were potentially violating HWC MACT, USEPA would have decreased, rather than increased, the OPL limits for metals under which Veolia is currently operating. *See* VES 008088-008283.

USEPA correctly acknowledges on page 21 of the Statement of Basis that the HWC MACT rule does not mandate the use of CEMS to document compliance with the HWC MACT limits for mercury, low volatile metals ("LVMs"), semi volatile metals ("SVMs") or chlorine. USEPA alleges the reason CEMs were not required in past permits was, in part, due to EPA's determination that performance specifications for mercury or multi-metals CEMS were not yet available when USEPA finalized the HWC MACT rule. To date, nothing has changed—USEPA still has not promulgated performance specifications or ongoing quality assurance or quality control procedures for multi-metals CEMS. In short, it is impossible to determine whether the multi-metals CEMS operates correctly. Roberson Aff. at VES 008290- 008302. Additionally, given that the Xact system and the draft performance specifications existed in 2008 when Veolia's last permit was issued, USEPA's current justification for the CEMS does not explain why CEMS was not required in 2008.

Nevertheless, USEPA justifies its attempt to force Veolia to install a multi-metals CEMS by stating:

> The use of a multi-metals CEMS is the only sure way to verify that Veolia's feedstream analysis procedures and the proposed feed rate limits are sufficient to assure continuous compliance with the HWC MCT limits.

Statement of Basis at 25 (VES 000163). However, USEPA offers no proof that "multi-metals CEMS is the only sure way to verify" HWC MACT limits. Further, USEPA refuses to allow Veolia to utilize the multi-metals CEMS technology in lieu of its emission monitoring requirements. Rather:

> [i]n addition, during the 12-month period when the multi-metals CEMS is being operated, Veolia would be required to comply with the feed rate limits for mercury, LVM or SVM for Unit 3. This would allow Veolia to demonstrate to EPA that the feed rate limits are sufficiently stringent to assure compliance with the metals emissions limits. At the end of the 12-month period, Veolia could petition EPA to continue to use the multi-metals CEMS as the primary means of compliance in lieu of complying with the feed rate limits.

Statement of Basis at 25-26 (000163-000164).[24] USEPA's actions are inconsistent with the regulations and its logic is flawed. USEPA is requiring a method (multi-metals CEMS technology) not approved in the regulations (absent a petition and additional proof provided by Veolia) to verify a method (OPLs and the FAP) approved by the regulations to demonstrate compliance. USEPA's analysis makes OPLs and the FAP irrelevant and unnecessary.

The only reasonable explanation for USEPA's demand that Veolia use both a multi-metal CEMS **and** OPLs/FAP is that USEPA lacks sufficient knowledge about, or confidence in, the multi-metals CEMS to allow its use for compliance purposes (notwithstanding the representations made in the Statement of Basis). As already discussed, USEPA's lack of knowledge of the technology is reflected in USEPA's unprecedented reliance on the financially interested Pall and Cooper to explain the technology and respond to Veolia's objections. *See* VES 001368-001371. Further, USEPA's lack of confidence would explain why USEPA has never required any commercial hazardous waste incinerator to install a multi-metals CEMS to address an issue that exists at all incinerators—whether the FAP and OPLs are sufficient to assure continuous compliance with the HWC MACT. USEPA has acted in an arbitrary and capricious manner by

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[24] USEPA's statement is false if for no other reason than a CEMS neither measures procedures nor feedrates; rather, a CEMS measures emissions. Roberson Aff. at VES 008299-008300. Further, USEPA's concern about not obtaining actual emissions performance is a concern it has with every commercial hazardous waste incinerator. For every other affected facility, USEPA has handled such concerns by requiring OPLs, FAPs and performance testing pursuant to the HWC MACT. Veolia should not be treated differently than any other incinerator. If a multi-metals CEMS were the only acceptable approach, then USEPA should require every incinerator to install and operate a multi-metals CEMS. Roberson Aff. at VES 008299-008300.

selecting Veolia to pay for an experiment to benefit USEPA so that USEPA can obtain more information about the technology and determine whether multi-metals CEMS technology can operate and accurately provide multi-metals analysis when used in commercial hazardous waste incinerators.

Under 40 C.F.R. 63.7(f), if a facility petitions to use a CEMS as an alternative test method, the petitioner must prove that the CEMS technology will work in the application. However, in this case, USEPA is arbitrarily and capriciously mandating that Veolia utilize a multi-metals CEMS with no proof that it will work. If Veolia had petitioned USEPA to use the technology and offered no proof that it would work, USEPA would have summarily and correctly rejected the request.

Moreover, USEPA is effectively acting as the petitioner vouching for the effective operation and accuracy of the new and untested multi-metals CEMS technology as an alternative test method under 40 C.F.R. 63.7(f). However, USEPA does not have the authority to impose this alternative test method on Veolia. Rather, the regulation provides that:

> The owner or operator of an affected source required to do performance testing by a relevant standard may use an alternative test method from that specified in the standard.

40 C.F.R. 63.7(f)(2) (emphasis added). USEPA is not an "owner or operator" that can request an alternative method under the regulation. Section 63.7(f) does not allow USEPA to unilaterally require Veolia to use an alternative test method such as the multi-metals CEMS, but even if it did, that requirement would be impermissible because the multi-metals CEMS has not been validated as an acceptable source of data.

USEPA is required to accurately set forth the legal and factual bases for permit conditions, however, it failed to do so in the Statement of Basis. Veolia should not be made to bear the risk of failure of the multi-metals CEMS technology when Veolia has demonstrated and will continue to demonstrate compliance with the HWC MACT by the prescribed methods—OPLs, FAP and CPT testing. Veolia has not petitioned to use the multi-metals CEMS technology as an alternative to traditional methods of demonstrating compliance. The monitoring firms that stand to gain financially from the sale of the multi-metals CEMS should incur the expense necessary to demonstrate to USEPA and industry that CEMS technology is robust and accurate. Similarly, USEPA should independently review the technology and implement it through rulemaking if it is a technology that USEPA wishes to mandate the hazardous waste incineration industry to use.

J. USEPA's Statement of Basis Is Inconsistent and Vague

USEPA attempts to justify the proposed OPLs in the Draft Permit by stating in relevant part:

> EPA's policy is not to grant feed rate limits that are significantly higher than the reported historical metal feed rates. Additionally, we believe that source-specific circumstances, including Veolia's compliance history, the variability of its feed stream, and its location in an area with significant environmental justice concerns, underscore the need to establish conservative feed rate limits for heavy metals.

Statement of Basis at 19 (VES 000157). On the basis of source-specific circumstances, USEPA has proposed unnecessarily conservative feedrate limits for mercury. For example, if Veolia were to feed mercury-containing waste at USEPA's proposed limits on all units, the highest estimated stack concentration from such feed would only be 43% of the emissions limit established under HWC MACT. In other words, the maximum feedrate limit for mercury results in less than half of the emissions allowed by the HWC MACT. *See* Statement of Basis, Table 2 at 17 (VES 000155).

Similarly, USEPA attempts to justify modifications to Veolia's FAP by stating in relevant part:

> EPA has reviewed Veolia's FAP and determined that it is necessary to supplement the mercury, LVM and SVM analysis procedures contained in the FAP in order to assure compliance with HWC MACT limits and the proposed feed rate limits. To address the identified deficiencies in Veolia's FAP, and assure compliance with the operating parameter limits, EPA has specific mercury, LVM and SVM analysis procedures in the permit.

Statement of Basis at 20-21(VES 000158-000159). Having modified the OPLs due to source-specific circumstances and modified the FAP in order to ensure compliance with the OPLs, USEPA attempts to justify the installation of a multi-metals CEMS by stating:

> [t]he use of a multi-metals CEMS is the only sure way to verify that Veolia's feed stream analysis procedures and the proposed feed rate limits are sufficient to assure continuous compliance with the HWC MACT limits.

Statement of Basis at 25 (VES 000163). If a multi-metals CEMS is in fact "the only sure way to verify" Veolia's HWC MACT compliance, USEPA cannot justify modifying the OPLs and the FAP. The source-specific factors necessary to justify the conservative OPLs and to ensure compliance with the MACT limits through the modified FAP should be eliminated since USEPA believes the "use of multi-metals CEMS is the only sure way to ... assure continuous compliance with the HWC MACT limits." If USEPA's statement concerning the multi-metals CEMS is true, no other limitation or procedure should be necessary.

K. USEPA's Draft Permit Condition Requiring the Installation of Multi-Metals CEMS Within 180 Days Is Impractical

The proposed Veolia permit states in relevant part:

> The Permittee shall install, calibrate, maintain and operate an x-ray fluorescence multi-metals CEMS on incineration Unit #3 within 180 days after this permit becomes effective, unless the Administrator determines that a time extension is warranted based on the Permittee's documentation in writing of factors beyond its control that prevent the Permittee from meeting the 180-day deadline.

Draft Permit at 26 (VES 000164). Pall (the only marketer of the multi-metals CEMS), however, informed Veolia that Pall could not deliver, install, calibrate and have the exact multi-metals

CEMS operational within 180 days. Each multi-metals CEMS sample transport system is unique for each installation and must be manufactured and installed based upon conditions at the installation location. Warchol Aff. at VES 008382. Since that contact, Pall has repeatedly failed to respond to inquiries from Veolia. Further, Veolia received a voicemail from Cooper Environmental Services informing Veolia that Pall has exited the multi-metals CEMs business. Warchol Aff. at 008383. Given Pall's representations that it could not meet the 180-day timeframe and Pall's subsequent abandonment of the technology, there is absolutely no basis to believe the 180-day timeframe set forth in the proposed permit is rational or practical.

Given the close relationship between USEPA and Pall, as reflected in the emails USEPA has placed in the administrative record, USEPA should already be aware that the timing set forth in the Draft Permit is impossible to achieve. *See* 40 C.F.R. Part 51, Appx. P (providing affected sources 18 months or more to install and perform tests on newly required CEMs). Further, documents in the administrative record reflect that it took Eli Lilly three years to obtain the necessary regulatory approval to operate its Xact CEMs as an alternative method. *See* VES 001013. Veolia utilizes incineration Unit 3 every day in its operations. Veolia should not be required to wait three years to operate Unit 3 while USEPA considers whether the CEMS is properly installed, calibrated, maintained and operational.

The Draft Permit provides that an extension of the 180-day deadline is available if the "Administrator determines a time extension is warranted based on the Permittee's documentation in writing of factors beyond its control that prevent the Permittee from meeting the 180-day deadline." Draft Permit at 26 (VES 000164). Veolia is in the incineration business and incinerator Unit 3 is an integral part of its business. Veolia cannot operate its business on the vagaries of whether an extension of time is warranted based upon the Agency's evaluation and determination of whether something is under Veolia's control. To operate its business effectively, Veolia must have more certainty than is offered in the Draft Permit.

Further, Veolia is in the business of safely disposing of hazardous waste, not installing and testing CEMS. Nor is Veolia in the business of installing and operating CEMS as a research project for USEPA. Now that Pall, the primary distributor of commercially available multi-metals CEMS has abandoned the technology, Veolia is aware of no timely means of obtaining multi-metals CEMS. Moreover, if Veolia locates another supplier of multi-metals CEMS, there is no way of knowing how long such technology would take to install.

Finally, the Agency's inability to meet deadlines throughout Veolia's permitting history and Eli Lilly's three-year delay in obtaining regulatory approval demonstrate that USEPA does not have a track record of promptly evaluating and responding to submissions related to this technology. The practical result, should the proposed modifications to the permit be forced upon Veolia, is that Veolia will have to shut down Unit 3 because the multi-metals CEMS cannot be delivered, installed, calibrated and operational within the 180-day deadline. Thus, as drafted, the proposed permit is equivalent to a shut-down order as to Unit 3, and is violative of Veolia's due process rights.

L. USEPA Has Acted with Bias Toward Veolia as Evidenced by the Administrative Record

1. *USEPA Demonstrated Bias by Making Derogatory Remarks Against Veolia in the Record*

On November 29, 2012, George Czerniak, Chief of the Air Enforcement & Compliance Branch, EPA Region 5, sent Doug Harris an email attaching preliminary draft documents relating to USEPA's proposal to revise Veolia's Title V Air Permit. One of the attachments was a "Fact Sheet" which contained numerous inaccurate and derogatory remarks concerning Veolia.

The Fact Sheet included the following statements reflecting USEPA's bias against Veolia:

> The U.S. Environmental Protection Agency is proposing to revise parts of a Clean Air Act permit for a *controversial* hazardous waste incinerator in Southern Illinois.

USEPA Nov. Fact Sheet at VES 001844 (emphasis added). There is nothing controversial about Veolia's incinerators. The facility has been a part of the Sauget community since 1980. In 2011, Veolia received the St. Clair County Environmental Stewardship Award. *See* VES 008288. United States Representative for the 12th Congressional District Jerry Costello recognized Veolia for its outstanding stewardship as reflected in the award. VES 008289. Further, at the July 8, 2008 Public Hearing for Veolia's Title V Draft Operating Permit, distinguished public figures from across the Southern Illinois region spoke out in favor of Veolia's facility. *See generally* VES 004740-004811. These figures included the Illinois State Representative of District 116 (Dan Reitz); the current and former mayors of Cahokia, IL (Frank Bergman and Dan Reed, respectively); the mayor of East Carondelet (Herb Simmons); the Executive Director of Archview Economic Development (Rhonda Sauget); the St. Clair County Local Emergency Planning Committee Chairman (Don Feher); the Manager for Environmental Compliance at Washington University (Livi Isringhausen); the former Emergency Management Agency Director of St. Clair County (Darryl Elbe), and the Solid Waste Coordinator for Madison County, Illinois, (Leah Dettmers), among others. Each spoke highly of Veolia and the benefits Southern Illinois receives from its operations. Counter to the USEPA's assertions, Veolia is an outstanding and respected member of the Southern Illinois community.

The Fact Sheet went on to state:

> The permit would add "feedrate" limits for certain heavy metals...[t]he heavy metals include mercury, arsenic and lead...U.S. EPA determined the requested limits are unacceptable and proposes to revise the permit to incorporate *more stringent* feedrate limits.
>
> . . . .
>
> The federal Agency is also proposing to deny the higher semi-volatile and low-volatile metal feedrates requested by Veolia and at the same time incorporate *tougher* limits into the permit.

USEPA Nov. Fact Sheet at VES 001844, VES 001846 (emphasis added). Not only is the choice of words inflammatory ("more stringent" and "tougher"), but also both of these statements are

flatly wrong. In reality, USEPA proposes a permit which—with the exception of mercury—will **increase** the feedrate limits for all other metals. For USEPA to make statements that suggest otherwise is inaccurate, portrays Veolia in a poor light, and is a blatant effort by USEPA to mislead the public as to the permitting decision.

The fact Sheet is even more obvious in its biased attitude towards the Veolia facility:

> In the proposed revisions to the Title V permit, Veolia will be required to install and operate a multi-metals continuous emissions monitoring system (CEMS) on *one of the most polluting incinerators (Unit #3)* for at least one year.

USEPA Nov. Fact Sheet at VES 001846 (emphasis added). Veolia has properly permitted and operated Unit 3 consistent with all applicable laws and regulations. USEPA's statements about Unit 3 are simply inaccurate and have no basis. Using terms like "one of the most polluting incinerators" is outrageous conduct by a government agency in an official proceeding and speaks volumes about USEPA's real motivation behind this reopening.

On November 30, 2012, Doug Harris contacted USEPA and requested that the above statements be removed from the final Fact Sheet or corrected. However, even after USEPA agreed to remove such comments, it nevertheless included the November 2012 Fact Sheet containing the derogatory statements as part of the administrative record available to the public. Thus, while the January version of USEPA's Fact Sheet does not contain these derogatory comments, they still can be found within the administrative record which is available for public review. The November 2012 Fact Sheet provides no additional information to the public and should have been removed.

2. *USEPA Demonstrated Bias by Refusing to Produce Information and Offer Proof of Allegations Contained Within the FOVs and Share Sampling Results Related Thereto Despite Veolia's Repeated Requests for such Information and Proof*

USEPA emphasizes in the Statement of Basis that FOVs are not final agency action subject to judicial review:

> EPA has determined that a compliance schedule is not required at this time to address the pending FOVs. An FOV is simply one early step in the EPA's enforcement process. This step is commonly followed by additional investigation or discovery, information gathering, and an exchange of views, all of which occur in the context of an enforcement proceeding, and are important means of fact-finding under our system of civil litigation. An FOV is not a final agency action and is not subject to judicial review. No binding legal consequences flow from an FOV, and an FOV does not have the force or effect of law.

Statement of Basis at 6 (VES 000144). Despite this assertion, as set forth above, USEPA is relying on the FOVs to support its permitting decision. *See* Statement of Basis at 19 (VES at 000157). Over several years, Veolia has repeatedly requested factual evidence of many of the allegations made in the FOVs. Further, Veolia has requested that the Agency provide it with

split sample results relating to moisture content from the performance testing conducted in August and September of 2008 to establish OPLs for mercury, SVMs and LVMs.[25] However, the Agency has arbitrarily and capriciously denied Veolia's requests for both the split sample results and evidence of many of the allegations made in the FOVs without explanation. Harris Aff. at VES 008387- 008390. Thus, Veolia has been denied its right to due process and the ability to review and evaluate the evidence the government alleges it has developed against it and now uses as a basis for the reopening.

3. *USEPA Demonstrated Bias by Failing to Undertake an Independent Evaluation of the Multi-Metals CEMS Technology and Adopting the Manufacturer's Representations Without Further Proof*

As discussed above, Veolia met with USEPA on September 18, 2012, in Chicago. During the meeting, USEPA expressed its desire that Veolia install a metals CEMS. Veolia did not wish to incur the multi-million dollar expense or sacrifice the time needed to install the untested metals CEMS technology. Veolia told USEPA that the burden of USEPA's demand would place it at an economic disadvantage in the marketplace, since no commercial hazardous waste incinerator in the United States used a metals CEMS to monitor stack emissions because the technology simply cannot successfully operate in the environment. USEPA's Nathan Frank, Chief of the Air Enforcement Section Branch, demonstrated bias by summarily dismissing Veolia's concerns with the statement, "[s]omeone has to be first." Warchol Aff. at VES 008382. Frank went on to state, as alleged in the Statement of Basis at 24 (VES 000162), that Eli Lilly successfully utilized the Xact multi-metals CEMS technology. Veolia explained that Eli Lilly never operated a commercial hazardous waste incinerator since it only accepted the relatively homogenous waste of Eli Lilly entities. Further, Veolia explained that the Xact was removed after the facility was purchased by Evonik. Warchol Aff. at VES 008382.

Following the meeting, as reflected in the emails USEPA has produced in the administrative record, USEPA failed to fairly evaluate Veolia's concerns about the metals CEMS technology. Rather, as reflected in the emails produced by USEPA, and discussed in Veolia's comments, USEPA simply requested that Pall guide Region 5 through the maze of information to build a scientifically defensible case for USEPA to require the use of the Xact CEMS at Veolia or, as Pall understood the assignment, "Per your request for building a case why the Xact 640 Multi-Metals CEMS cannot be rejected from monitoring a HWI." VES 001368. The emails reflect that USEPA never fairly evaluated Veolia's concerns, but rather abdicated its regulatory responsibility and relied upon Pall to develop its case for why the technology could not be rejected.

USEPA's unsubstantiated statements on behalf of the Xact CEMS demonstrate bias that is reflected in the Statement of Basis. The Xact multi-metals CEMS is the only multi-metals CEMS USEPA identifies in the Statement of Basis. See Statement of Basis at 21 nn.22, 23-25

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[25] Veolia requests factual evidence related to the FOVs and the split sample results be made a part of the administrative record in this matter. The public comment period should be reopened following these additions.

(VES 000159-000161). Further, the Statement of Basis not only identifies Cooper, the developer, but also identifies Pall, who was at that time the marketer of the technology:

> [t]he Xact multi-metals CEMS was developed by Cooper Environmental Services, LLC (10180 SW Mimbus Avenue, Suite J6, Portland, Portland, Oregon 97223) and is now being marketed by Pall Corporation (25 Harbor Park Drive, Port Washington, New York 11050).

Statement of Basis at 23 (VES 000161). The only reason to include information about the marketer of the technology in the Statement of Basis is because USEPA is instructing Veolia to purchase the Xact multi-metals CEMS from Pall. USEPA goes on to state that Veolia has no other option as no other technology is commercially available:

> Several additional multi-metals CEMS are under development, including several efforts focused on laser-based atomic emission spectroscopy (AES), microwave AES and spark-based AES. However, EPA is not aware that any of these other technologies are currently commercially available.

Statement of Basis at 25 (VES 000163).

As already discussed, USEPA in the Statement of Basis at 21 through 26 has made unsubstantiated and inaccurate claims in an attempt to place the multi-metals CEMS technology in the best light possible. However, USEPA cannot identify one commercial hazardous waste incinerator that uses multi-metals CEMS for emission monitoring compliance. USEPA is attempting to force Veolia to purchase Pall's Xact CEMS despite the fact that this expensive technology is unproven, failed in the incinerator at the former Eli Lilly facility, and is not and has never been successfully installed for purposes of emission monitoring compliance in a commercial hazardous waste incinerator.

M. USEPA's Statement of Basis Does Not Reflect a Fair and Considered Judgment Regarding the Proposed Modifications to the Permit.

1. *The Statement of Basis and the Draft Permit are Inconsistent with Each Other*

There are significant discrepancies regarding feedrate limits between the Statement of Basis at 17, Table 2, and the Draft Permit at 12. For Unit 2, the Statement of Basis shows a feedrate limit for LVM as 68.5 lb/hr—the Draft Permit has a value of 84 lb/hr. For Unit 4, the Statement of Basis has a feedrate limit for SVM of 98.1 lb/hr while the Draft Permit has a value of 64 lb/hr. USEPA needs to act immediately to rectify these two conflicting limits and reopen the Draft Permit and Statement of Basis for additional reasonable public comment following such action.

2. *USEPA Has Made Conflicting Statements as to Whether Environmental Justice Concerns Actually Exist*

Veolia's facility has been located in Sauget, Illinois for over twenty years. The present action is the first time a regulatory agency has sought to reopen a permit issued to Veolia. USEPA has made conflicting statements on the significance of the location of Veolia's facility to the

reopening. This conflict is evident when USEPA's statements concerning environmental justice in USEPA's Notice are compared with those contained within the Statement of Basis.

USEPA's Notice:

> Veolia's Sauget facility is located just east of St. Louis, Missouri, in an area with ***potential*** environmental justice concerns.

Notice at 1 (VES 000171)(emphasis added).

USEPA's Statement of Basis:

> EPA's policy is not to grant feed rate limits that are significantly higher than the reported historical metal feed rates. Additionally, we believe that source-specific circumstances, including Veolia's compliance history, the variability of its feed stream, and its location in an area with ***significant*** environmental justice concerns, underscore the need to establish conservative feed rate limits for heavy metals.
>
> . . . .
>
> Due to the facility's location in an area with ***significant*** EJ concerns, EPA believes it is important to provide enhanced public participation opportunities to overburdened communities near Veolia.

Statement of Basis at 19 & 28 (VES 000157 and 000166) (emphasis added). It appears, based on USEPA's own materials, that USEPA needs to perform additional study and collect further evidence to determine whether "potential environmental justice concerns" actually exist. Pending such additional study and evidence, USEPA should not cite to significant environmental justice concerns since USEPA appears conflicted as to whether such concerns exist.

Further, Veolia's facility has not moved and the demographics in the area in which it is located have not changed. To the extent USEPA attempts to justify the reopening, in part, due to the location of the facility, USEPA must explain why **in 2008** USEPA exercised its judgment and issued Veolia its permit. The Agency cites to the 2000 U.S. Census data in the Statement of Basis in order to support its environmental justice concerns. This exact data existed in 2008 when USEPA issued Veolia's Title V permit. The facility's location and the surrounding demographics have not changed since 2008, but the Agency's decisions with regard to Veolia's permit have changed. USEPA considered the same data, but arrived at a different conclusion evidencing that its decisionmaking is arbitrary and capricious.

3. *USEPA's Proposed Modifications Regarding Restrictions on Beryllium and Required Assumptions Regarding Beryllium Emissions Are Unclear, Flawed, Inconsistent, and Unlawful*

USEPA is proposing modifications to the Beryllium restrictions included in Veolia's Title V permit that are unclear, flawed, inconsistent, and unlawful.

(i) USEPA's Draft Permit Unlawfully Prohibits Veolia From Taking Any Beryllium-Containing Waste

Draft Permit Condition 2.1(C)(1) contains the following proposed change:

> The Permittee shall not burn hospital medical infectious waste, municipal waste, or beryllium ~~NESHAP~~ containing waste. [42 U.S.C. § 7661c(a)]

Draft Permit at 11 (VES 000012). As drafted, the deletion proposed in this revision would expressly prohibit Veolia from receiving any waste that contains beryllium. USEPA has provided absolutely no basis or rationale for this modification and therefore its inclusion in the Draft Permit is arbitrary and capricious. Moreover, 40 C.F.R. § 71.7(f)(2) provides that "[p]roceedings to reopen and issue a permit ... shall affect only those parts of the permit for which cause to reopen exists." 40 C.F.R. § 71.7(f)(2). USEPA has no cause to reopen Veolia's permit to prohibit Veolia from accepting all Beryllium-containing waste.

(ii) USEPA's Proposed Method of Determining Default Emissions Values in Permit Condition 2.1(D)(1)(i)(ii) is Flawed and Produces Absurd Results

Section 2.1.(D)1.(i)(ii) of the Draft Permit states:

> If the Permittee installs a multi-metals CEMS that is incapable of measuring any of the specified metals, the Permittee must determine the default value for that metal's emissions using the highest measured concentration of that metal in any feedstream burned by the Permittee in the last 5 years and the lowest system removal efficiency with respect to that metal as obtained during any comprehensive performance test performed by the Permittee over that same period. The Permittee must assume that all wastes fed to the incinerator contain the affected metal at the default concentration.

Draft Permit at 27 (VES 000028). The multi-metals CEMS being forced on Veolia by the Agency cannot quantify beryllium emissions. In light of this fact and the requirements of the Draft Permit, Veolia must assume all of its waste contains beryllium and then artificially estimate those emissions from those non-existent and fictitious concentrations. Under this scenario, periodic reporting of emissions for arsenic, cadmium, chromium, lead, and mercury would consist of calculated emission values derived from the CEMS data. However, periodic reporting of emissions for beryllium would consist of calculated emission values based on: (1) the highest measured concentration of beryllium in any feedstream burned by Veolia in the last 5 years and (2) the lowest system removal efficiency for beryllium as obtained during any comprehensive performance test performed by Veolia over that same period.

The highest concentration of beryllium in any Veolia feedstream over the last 5 years was 100%. This is due to the facility's ability to accept lab pack quantities of beryllium metal. The proposed permit requires Veolia to assume that all waste being fed contains the highest measured concentration of beryllium in any feedstream burned by Veolia in the last 5 years—i.e., 100%.

The average total waste feedrate for Unit 3 for 2012 was approximately 2,000 pounds per hour. If Veolia must assume that all feeds contain the highest concentration of beryllium (as contemplated by the draft permit), then Veolia would be limited to feeding only 46 pounds of waste per hour under the current LVM feedrate limit.

The vast majority of waste Veolia receives is highly unlikely to contain beryllium. Using USEPA's flawed method, Veolia's operations would be severely curtailed due to the emission limit for beryllium without ever having fed any actual beryllium into the incinerator. Additionally, Veolia is required to report beryllium emissions on its IEPA annual emissions report and its USEPA TRI report. Under the conditions of the Draft Permit, Veolia would be forced to grossly over-report these fictitious beryllium emissions.

USEPA has provided absolutely no basis or rationale to support the requirement that Veolia assume that all of its waste contains beryllium. In addition, the Draft Permit's provisions regarding beryllium are vague, ambiguous, and inconsistent. While Section 2.1(C)(1) prohibits Veolia from incinerating any beryllium containing waste, Section 2.1(D)1(i)(ii) proposes a method that ensures that Veolia will far exceed the emissions limitation without actually feeding beryllium into the incinerator. This result—and these provisions of the Draft Permit in their entirety—are arbitrary, capricious, and lack a rational basis.

Finally, USEPA's proposed modifications regarding beryllium containing waste deprives Veolia of its liberty and property rights as guaranteed by the U.S. Constitution. The Draft Permit totally deprives Veolia of its ability to accept any beryllium-containing waste without due process or compensation. Likewise, the Draft Permit, by requiring Veolia to assume that all waste contains exceptional amounts of beryllium, unconstitutionally limits Veolia's overall operations to the extent that it will be a non-viable commercial entity. These proposed conditions should be rejected.

4. *The Risk Assessment Relied Upon by USEPA Is Based Upon Inaccurate Assumptions that Run Counter to the Evidence Developed by Other Regulatory Agencies and by Veolia and Provide no Support for Multi-Metals CEMS.*

USEPA alleges enhanced monitoring requirements for heavy metals were included in the draft Title V permit based on site-specific dispersion modeling and risk assessment conducted by USEPA for purposes of RCRA permitting and around lakes used for fishing downwind of the facility. The Statement of Basis states in relevant part:

> The enhanced monitoring requirements are based on site-specific conditions at the Veolia Facility and in the surrounding community. Previous site-specific dispersion modeling and risk assessment, conducted by EPA for purposed of RCRA permitting, showed that mercury emissions from the Veolia facility could result in deposition of mercury in and around lakes used for fishing downwind of the facility.[40] The proposed enhanced mercury monitoring requirements will help protect human health and the environment from the consequences of mercury

> emissions by providing further assurance that the permitted mercury limits will not be exceeded.

Statement of Basis at 28 (VES 000166) (citation to USEPA's Risk Screening is provided in footnote 40).

However, the May 2007 risk screening concluded no additional limits were necessary for dioxins, cadmium, lead, chromium, beryllium and arsenic. VES 007640. Thus, USEPA's risk screening provides no support for the installation of a multi-metals CEMS.

Further, although the screening supposedly found that emissions of mercury from the Veolia facility at the HWC-MACT Rule emissions standard would result in potential exposure to methyl mercury above USEPA's risk management guidelines, its findings for mercury were scientifically unsupportable. As set forth in the comments of Delana W. Owen (hereinafter "DWO"), whose comments and attachments thereto are referenced and incorporated as though set forth herein, USEPA Region 5 performed a risk screening (DWO at VES 007616-00007760, collectively "Report")[26] and used a basis and findings that are counter to evidence developed by the government and Veolia.

Veolia provided additional information to USEPA so that site-specific values could be utilized in the evaluation of risk and hazard, but USEPA Region 5 refused to respond to or even consider the information provided and chose to rely on default parameters that bore no relation to the site in question. DWO at VES 007607. The Report includes calculations based on assumed **theoretical**, rather than **actual** sampling and analysis of water and fish from Frank Holten State Park, and the **hypothetical** consumption of fish by residents in the area. Due to errors, unsubstantiated assumptions, and the failure of USEPA to resolve conflicting information, the Report is technically indefensible. The Report only addresses facility risk and hazard superficially, rather than deriving a conclusion from a fair evaluation of reasonable assumptions and data. DWO at VES 007606.

USEPA Guidance that applies to Risk Assessments for Hazardous Waste Combustion Facilities provides the following advice to permittees:

> We encourage you to use existing and site-specific information throughout the risk assessment process in order to properly evaluate actual regulated operations for any particular combustor. We generally recommend conservative default assumptions only when they will provide confidence that ensuing permit limits

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[26] Footnote 40 in the Statement of Basis at 28 states that a copy of the risk assessment is available on EPA's website. USEPA's May 2007 Risk Screening and Risk Management Recommendations for Veolia is available on the website and has been marked in the administrative record by Veolia as VES 007620-VES 007713. However, pages 20 and 21 of the Risk Screening (*compare* VES 007639 *with* VES 007640) are missing from the document on the website. Veolia has been unable to locate these pages on any EPA website. Veolia requests these pages be added to the administrative record and public comment be reopened following such additions.

> will be health protective.... Throughout the HHRAP we offer parameter values for you to consider. These values are based on a number of elements, such as the best science available and professional judgment. Since this is a national level guidance, the recommended values typically reflect national average conditions. The values will be more appropriate for some sites, and less so for others. For example, the type of water body near a facility (i.e. lake, river, wetland) may affect the methylation rate of mercury in the water body, or the type of fish consumed may affect percent lipid content used in the assessment. So, a value that is reasonable for one facility may be over (or under) protective at a different facility.
>
> . . . .
>
> You should generally make every effort to reduce limitations and uncertainties in the risk assessment process, since they can affect the confidence in the risk assessment results.

EPA 530-R-05-006, September 2005 at 1-9. USEPA failed to reduce limitations and uncertainties despite the fact that additional information was easily accessible. USEPA also used default assumptions without accounting for evidence that ran counter to such default assumptions.

Specific issues that are fatal to the Report's conclusions include, but are not limited to:

- The Report does not take into account that the Frank Holten Lakes are not a closed system. The government admits in an email, which Veolia makes a part of the public record, that Frank Holten Lakes are connected via drainage canals to the Mississippi River and to each other. These connections allow a constant exchange of fish between the River and lakes. The purpose of the Report is to evaluate whether Veolia's emissions are potentially adversely affecting the fish and humans consuming the fish from Frank Holten Lakes, and yet, it fails to recognize or account for whether the fish being studied spent any substantial time in the lakes. DWO at VES 007607; VES 007933-008084.

- The Report assumes that all fish in the Frank Holten Lakes are subjected to potential contaminants from Veolia emissions during their entire life cycle. In fact, USEPA Region 5 is or should be aware that channel catfish and other fish likely to be the focus of the public's fishing efforts are routinely stocked in Frank Holten Lakes at catchable size and that many fish caught from Frank Holten Lakes are caught shortly after stocking (i.e. before the fish have spent any significant time exposed to the conditions in these lakes). DWO at VES 007607; VES 007931-007932.

- The Report specifies a default trophic level for fish caught from the Frank Holten Lakes of 4.0, which is the highest and most conservative value that is recommended for risk assessment. In an email, which Veolia has made a part of the public record, IEPA has provided information that a more appropriate trophic level for the Frank Holten Lakes is 3.5. DWO at VES 007607-007608 and VES 007929-007930. The actual site-specific trophic level of fish harvested may be lower than either of these values but USEPA has failed to consider this evidence. DWO at VES 007608.

- The Report and USEPA make contradictory assumptions that background concentrations of mercury in Frank Holten Lakes are both zero and high enough to contribute to increased concentrations overall. Both assumptions cannot exist simultaneously. DWO at VES 007608; VES 007929-007930.

- The Report inaccurately assumes high fish consumption rates from Frank Holten Lakes. The Report specifies a consumption rate based on the alleged presence of subsistence fishers in the nearby area, who allegedly consume fish from the Frank Holten Lakes on a daily basis. The Report assumes this level of consumption without attempting to verify it in a scientific fashion and without considering the overwhelming evidence to the contrary. Harvesting of fish from the Frank Holten Lakes is guided by notices at the lakes that restrict the quantity of fish removed based on PCB levels in the lakes. (It should be noted that PCBs have never been handled by Veolia's Sauget, Illinois facility.) Therefore, these notices would discourage any person who might seek to become a subsistence fisherman from fishing regularly in these lakes. The presence of PCBs in the fish which caused the government to post the consumption limitations are counter-indicative of subsistence-level consumption, and these PCB levels are independent of Veolia. Further, the lakes do not contain a large enough fish population to support subsistence consumption. The Report fails to consider these facts in reaching its conclusions. Further, the Report fails to consider Franklin Engineering's objections to the inaccurate consumption rates. DWO at VES 007608.

Veolia contracted Franklin Engineering Group, Inc. to perform an independent Human Health Risk Screening Assessment using the same regulatory guidance and methodology as the USEPA Region 5 Risk Screening. Franklin took into consideration available site-specific information related to the issues discussed previously. Franklin's Human Health Risk Screening Assessment demonstrated that Veolia operations did not pose significant health effects at the current regulatory limits for the hazardous waste incinerator. DWO at VES 007608; VES 007761-007928. The Human Health Risk Assessment Report was published in September 2004, and revised in May and October 2005. USEPA does not consider Franklin's Human Health Assessment Report in the Statement of Basis.

Risk screening methods are only valuable if they are based on accurate information and reasonable assumptions. The Report fails in this regard. Risk *assessments*, such as that conducted by Veolia, are more compelling than risk *screenings* because they utilize site-specific information to more closely approximate health impacts, as recommended by USEPA's own guidance (as discussed above). Each of the five issues presented are discussed in depth in the following sections.

(i) The Report Fails to Consider that Water and Fish Move Freely Between the Mississippi River and the Frank Holten Lakes

Dan Stephenson of Illinois Department of Natural Resources stated in an October 2011 email that:

> [T]he lakes at Frank Holton are connected via ditches to the Mississippi River allowing a constant exchange of multiple species between lake and river. This is not a static system. There could be a claim that the fish tested originally came from the river and pick up the methyl mercury elsewhere.

DWO at VES 007609; VES 008077-008078. USEPA failed to consider this fact in the Report. Certainly, there is carryover of fish species and pollutants between the lakes themselves and between the lakes and water bodies that are fed by the lakes. The INHS Post-Restoration Monitoring Report documented flow between the lakes themselves and between the lakes and other water sources:

> For Lakes 1 and 2, the types of unaccountable flows are limited. Interlake transfers can be either inflows from Lake 3 or outflows to Lake 3. These flow rates, which are generally low due to the limited interconnecting channel capacity, can be significant over long periods of time. A one-directional flow of as little as 1 cubic foot per second (cfs) can result in a monthly inflow of more than 50 acre-feet...[i]n addition to the interlake transfers and ground-water flows discussed for Lakes 1 and 2, there are replacement inflows from Harding Ditch to restore evaporation and infiltration losses. These replacement flows are not available to the upper lakes following their summer drop in level. The connection of Lake 3 to Harding Ditch is continuous, and these "slow" losses can be made up.

DWO at VES 007609; VES 007986. Lake Management Status Reports also document the transfer of fish species from connecting water bodies, as stated in the April 3, 2003 report:

> The lake also floods through ditches connected to the Mississippi River. This connection introduces many undesirable species including common carp, buffalo, grass carp, bighead carp, gizzard shad, yellow bass, and bullheads.

DWO at VES 008083. Regulators therefore concede Frank Holten Lakes are affected by other sources. Likewise, the assumption that only fish that begin their life cycle in the lakes are harvested is inaccurate. Therefore, modeling the lakes as a closed system is inaccurate and inappropriate. The Report and the Statement of Basis fail to consider this evidence. DWO at VES 007609.

(ii) The Report Fails to Consider the Effect of Fish Stocking on Assumed Mercury Concentrations in Fish From Frank Holten Lakes, Thus Also Invalidating the Report

Both of the Frank Holten lakes are regularly stocked with catchable size fish from hatcheries. Main Lake is generally stocked with an annual total of over 10,000 catchable size fish including

rainbow trout, channel catfish, and largemouth bass. Lake 3 is also stocked with thousands of catchable size fish annually including channel catfish and largemouth bass. These species of fish represent three of the five most prevalent species of fish harvested in the State of Illinois. DWO at VES 007609-007610; VES 007931-007932.

The Report and the Statement of Basis failed to consider the effect of such stocking. Fish stocked later in their development or at catchable size are less affected by lake contaminants since they are not exposed to contaminants during their entire life cycle, most notably, during earlier stages when increased uptake of contaminants is accomplished. Consequently, incremental risk to fishers is reduced due to the practice of annual stocking of these lakes. DWO at VES 007610.

(iii) The Report Used a Trophic Level that is not Supported by the Available Evidence and Overstates Mercury Uptake in Fish

Risk Assessment modeling estimates exposure to mercury through fish consumption by calculating the degree at which mercury concentrates in the fatty tissues of fish when exposed to the pollutant in the water column. A bioaccumulation factor (BAF) is specified by guidance that is defined as the ratio of methylmercury concentration in fish flesh divided by the concentration of dissolved methylmercury in the water column. Bioaccumulation factors are typically related to trophic level with trophic level 4 being specified as the default value in the absence of site-specific information. This highest level trophic level corresponds to a higher BAF, since larger species are assumed to have been exposed to any potential contamination for longer and also to be higher level food chain representatives. DWO at VES 007610.

Available data demonstrates that the maximum trophic level of 4.0 is not representative of fish caught at Frank Holten Lakes. Further, information from IEPA and USEPA Region 5 has been contradictory and unsubstantiated with respect to this parameter. For example, USEPA Region 5 stated in their Addendum 1 - Risk Screening for the facility that "The available information indicates that the lakes at Frank Holten State Park contain fish at a trophic level 4." Meanwhile, Mr. Ted Dragovich from IEPA stated in his August 15, 2011 email that "USEPA adjusted the trophic level down from 4 to 3.5 for the last risk assessment". DWO at VES 007610; Compare DWO at VES 007849 to VES 007929-007930. USEPA has never attempted to reconcile this contradictory information in its Report or the Statement of Basis.

Fishing reports supplied by Mr. Fred Cronin, Fisheries Biologist at the Illinois Department of Natural Resources, Division of Fisheries, from 2001 – 2004 indicate that largemouth bass, which are the only Trophic Level 4 fish documented at Frank Holten Lakes, are largely present due to stocking practices. The Lake Management Status Report from 2003 states:

> Maintaining a decent sport fishery in this lake is challenging. The physical habitat of the lake is quite poor. The lake is shallow and turbid with no aquatic plants and little structure. The lake also floods through ditches connected to the Mississippi River. This connection introduces many undesirable species including common carp, buffalo, grass carp, bighead carp, gizzard shad, yellow bass, and bullheads. These species compete

> directly and indirectly for the available space and resources of the lake.... However the continued stocking of rainbow trout, channel catfish, and largemouth bass can provide some quality angling opportunities at this lake.

DWO at 008083.

Due to the stocking practices, trophic levels 3.5 and 4.0 are both inappropriate to represent contaminated fish that are routinely caught from the Frank Holten Lakes since the fish do not spend their lives in the Frank Holten Lakes. In any case, the Statement of Basis and the Report's failure to address or even mention the effect of stocking and the Mississippi River on the trophic levels of the fish—and the Report's failure to explain why the trophic level was not lowered to 3.5 as stated in the August 15, 2011 email—demonstrates the Report's failure to accurately represent and portray the conditions in the lakes and the anticipated mercury levels, if any, in the fish. DWO at VES 007610-007611.

(iv) <u>The Report Arbitrarily Assumes Two Conditions that Cannot Exist Simultaneously—Both Background Concentrations of Mercury and no Mercury in Frank Holten Lakes</u>

The Report assumed *both* background levels of mercury and no background levels of mercury in the water column. Each condition is exclusive of the other. They cannot both be simultaneously true. Nevertheless, the Report and Statement of Basis fail to address this issue.

One of the assumptions made by USEPA Region 5 is that background levels of mercury in the Frank Holten Lakes require a more stringent benchmark for comparison to risk assessment results because of the likelihood of increased background levels. USEPA's Risk Screening states:

> [R]isk management decisions which follow U.S. EPA recommendations typically consider the potential for cumulative emissions indirectly by: (1) assuming that other nearby sources of similar toxic metals contribute up to three times the amount of the facility being evaluated ....

DWO at 007640. This conservative approximation is based on regulatory guidance such as the following excerpt from the Region 6 Risk Management Addendum (EPA-R6-98-002, July 1998), which indicates that background concentrations are assumed to account for a significant fraction of exposure:

> [F]or the purposes of RCRA permitting decisions and consistent with U.S. EPA (1994c), U.S. EPA Region 6 recommends a modified target hazard level, to account for background contributions, from an *HQ* or *HI* target value of 1.0 to a target value of 0.25. This modification eliminates the need to collect background COPC [Constituent of Potential Concern] concentration data before completing the risk assessment, by assuming that COPC emissions from hazardous waste emission units result in incremental increases of existing background COPC concentrations, which are, by default, assigned an *HI* or *HQ* value of 0.75.

> Although background COPC *HQ* or *HI* values might not equal 0.75, as a result of this modified target level, either the *HQ* (for a single COPC) or the *HI* (for multiple COPCs or pathways) resulting from combustion unit emissions should be less than 0.25. An *HQ* or *HI* equal to or exceeding 0.25 indicates a potential for noncarcinogenic health effects. However, an *HQ* or *HI* equal to or exceeding 0.25, rather than necessarily indicating that noncarcinogenic health effects can or will occur, indicates only that there is a potential for noncarcinogenic effects, based on a specific set of exposure, model, and toxicity assumptions.

EPA-R6-98-002, July 1998 at ADD-3. Although setting a benchmark at 25% of the target hazard level is a conservative approximation that can be assumed in the absence of site-specific data, the determination of actual background levels allows the development of more accurate risk assessment parameters and comparison to the more appropriate benchmark. Therefore, Veolia proposed the collection of water samples from the Frank Holten Lakes to eliminate the need for this overly conservative approximation, as well as to more closely model mercury concentrations in the lakes. In response to Veolia's proposal, IEPA stated it was unnecessary to attempt to quantify mercury concentrations in the water column because those values were already assumed to be zero. *See* DWO at VES 007929-007930.

The Report is simply not evenhanded. When the Report wishes to justify reducing Veolia's emissions, it claims the lakes and fish are already burdened by mercury and therefore justifies a stringent approach when evaluating Veolia's emissions against this assumed already burdened background. However, when Veolia wishes to actually test the lakes, the agencies make the contrary assumption which is that the fish, water and sediment samples have no mercury. DWO at VES 007611-7612.

(v) <u>The Report Inaccurately Assumes High Fish Consumption Rates</u>

There is no scientifically valid documented evidence of subsistence fishing in the area of Sauget, Illinois or Frank Holten Lakes. Nevertheless, the Report utilizes a consumption rate that represents subsistence fishers in the calculations performed. Franklin Engineering has informed USEPA that, based upon interviews, surveys and other information no subsistence fishing takes place in the lakes, but this information was not considered by USEPA in the Report or the Statement of Basis. The unjustified assumption of subsistence fishing grossly overestimates risk. DWO at VES 007612.

Based on the evidence obtained from government employees in charge of the location and government-generated documents relating thereto, Veolia in its risk assessment determined that at most there was a potential for the presence of recreational fishing at Frank Holten Lakes. This determination was based on discussions with Mr. Fred Cronin, Fisheries Biologist at the Illinois Department of Natural Resources, Division of Fisheries in January 2005. Although harvesting records were not available for more recent years, Mr. Cronin discussed the function of the park and its lakes as recreational. He advised that fishing at these lakes has developed from "a source of protein to recreational activity." He indicated that future creel surveys would likely indicate much greater catch and release activity than had been present in the past. DWO at VES 007612-007613.

Further, creel studies performed at Frank Holten Lakes support the determination that fishing conditions are poor and unlikely to support heavy consumption of any species. DWO at VES 007613. A creel survey was conducted on the lakes after the reconstruction project to enhance recreational use of the area in the early 1990s by the INHS under Federal Aid Project F-69-R. The 1994 report stated:

> For the most part, the results of the creel survey were about what would be expected from an urban lake. But exceptions were found in angling pressure and boat fishing versus shore fishing. The total of 248 hours/acre (hrs/ac) fishing pressure measured is low compared to 666 hrs/ac at Beaver Dam and 850 hrs/ac at Siloam Springs. Further, shore fishing accounted for 80 percent of the fishing effort and boats accounted for only 20 percent. Normally, one would expect a 60-40 split the other way. The angler using FHSP Lakes traveled an average 4.6 miles to fish, and the overall rating of the lake by the anglers on a scale of 1 - 10 was 2.7, indicating much dissatisfaction with the fishing.

DWO at VES 008048-008049. The same study went on to say that:

> As an example, largemouth bass, the main predator stocked in these lakes, were caught at only 4.8 pounds/ac, but one would expect the catch rate to be about 20 pounds/ac. Further, it appears that the anglers are keeping most of what they catch, as the difference between catch and harvest is not great. The average size of fish harvested was small. Yellow bass, for instance, were less than 0.1 pound on the average. It is difficult to envision anyone being able to catch a fish that small...In summary, the catch results reflect the angler rating of the lake. Anglers were catching low numbers of fish that, for the most part, were smaller than expected or desired. This is probably due to lack of macrophytes, significant reduction in fish habitat during the summer stratification period, poor quality and quantity of benthos, overharvest, and/or possibly because most of the fishing was from the bank, limiting anglers to a relatively small proportion of the lake.

DWO at VES 008049.

The Report should have never been based on a consumption rate based on subsistence fishing. Further, the Report failed to consider the creel studies and information developed by Veolia such as the comments of IDNR biologist Fred Cronin that subsistence fishing does not take place in the area. Further, given the proximity of other large bodies of water, including the Mississippi River and Horseshoe Lake State Park, even if there were subsistence fishers in the local area—and there is no evidence that such fishers exist in the area—they would be unlikely to fish solely at Frank Holten State Park. The most reasonable and likely scenario is that the recreational fisher and recreational fisher child exposure scenario should have been used because, as the evidence demonstrates, the Frank Holten Lakes are most likely lightly fished for recreational purposes. Therefore, the use of the recreational fisher and fisher child exposure scenarios more closely approximate the potential for risk than that of the subsistence fisher and fisher child. As Veolia demonstrated in its risk assessment, when the recreational scenario is utilized, no increased risk is found. DWO at VES 007612-007614; VES 007770.

USEPA acted in an arbitrary and capricious fashion by failing to consider all of the evidence developed by other regulatory agencies and provided by Veolia and Franklin Engineering. If USEPA had considered all the evidence, as opposed to simply selecting to consider evidence it felt was favorable to its conclusion, USEPA would have found that Veolia's current Title V permit is protective of the human health and the environment and no additional requirements are needed.

N. USEPA Should Promulgate a National Standard That Imposes Multi-Metal CEMS On All Hazardous Waste Combustors

USEPA posits that the multi-metals CEMS and enhanced feedstream analysis requirements are necessary to "assure that the OPLs established in the permit are adequate to assure compliance with the metals emissions limits in the HWC MACT." Statement of Basis at 21 (VES 000159). Specifically, USEPA asserts that CEMS are necessary to correct deficiencies with the monitoring requirements currently devised under the HWC MACT:

> Generally, feedstream analysis poses several challenges, including the uncertainty associated with 1) measurement of extremely low metal concentrations in the feedstream (i.e., concentrations at or near the detection limit of the measurement device); 2) heterogeneity of the hazardous waste, which may lead to a non-representative sample and hence an inaccurate estimate of the metal feed concentration; and 3) inability to demonstrate continuous compliance with MACT limits, as required by the HWC MACT, since there is generally a considerable time lag between sampling and analysis.
>
> The uncertainties caused by feedstream analysis are largely solved when an EPA-approved CEMS is used to directly measure emissions.

Statement of Basis at 21 (VES 000159).[27] The challenges enumerated by USEPA are not unique to Veolia; rather, they are monitoring problems common to each and every hazardous waste incinerator regulated under the HWC MACT. As currently devised, the HWC MACT requires all such incinerators to employ a system of OPLs and feedstream analysis to ensure that they meet the emissions limits set forth for mercury, SVMs, and LVMs. *See* 40 C.F.R. § 63.1209(l) ("You must comply with the mercury emission standard by establishing and complying with the following [OPLs]"); § 63.1209(n) ("You must comply with the semivolatile metal (cadmium and lead) and low volatile metal (arsenic, beryllium, and chromium) emission standards by establishing and complying with the following [OPLs]"); and § 63.1209(c) ("Prior to feeding the material, you must obtain an analysis of each feedstream that is sufficient to document compliance with the applicable feedrate limits provided by this section"). For Veolia alone,

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[27] USEPA offers no explanation as to what is meant by "lag" with regard to the sampling and analysis performed pursuant to the FAP; nor is it clear how this relates to HWC MACT compliance. Veolia always characterizes its waste stream for metals prior to incineration.

USEPA is now stating that the explicit directives of the HWC MACT are insufficiently certain and that multi-metals CEMS are necessary to assure compliance with the standard. Because all hazardous waste combustors in the United States rely on OPLs and feedstream analysis to comply with the HWC MACT emission limits, USEPA's apparent change in policy regarding the adequacy of OPLs and feedstream analysis should be applied to all hazardous waste combustors—not just Veolia.

In light of USEPA's pronouncement, all sources under the HWC MACT must now be concerned that reliance on a FAP and OPLs, without a multi-metals CEMS, could cause them to be out of compliance and possibly subject to enforcement. Moreover, at the very least, it is unclear whether USEPA still believes feedstream analysis is sufficient to maintain compliance with the standards. Thus, because USEPA has now created uncertainty for a whole class of sources regarding the appropriate means of compliance, the Agency should undertake industry-wide notice and comment rulemaking to propose multi-metals CEMS and the enhanced feedstream requirements it is now proposing for Veolia. Such rulemaking would have several advantages over imposing these requirements in piecemeal fashion in individual Title V permits. Specifically, it would allow the entire hazardous waste combustor industry to work with the Agency in developing these monitors for the purposes of compliance. This would advance the technology further and faster and lead to better overall metals monitoring across the entire industry. Promulgating the use of multi-metals CEMS across the entire industry would also spread the costs of development among all sources regulated under the HWC MACT—instead of arbitrarily and capriciously imposing all of those costs on Veolia. Finally, and most importantly, if USEPA believes that the current system of OPLs and feedstream analysis does not sufficiently assure compliance with the HWC MACT, then the Agency has a duty to the public to promulgate a rule requiring the development of multi-metals CEMS across the entire hazardous waste combustor industry.

O. Veolia's Specific Incorporation of Other Public Comments

In addition to the comments set forth in this document, Veolia incorporates into these comments as though fully set forth herein, the affidavits and comments of the below listed individuals and requests that USEPA consider and respond to these affidavits and comments:

- Emma York, Evonik Manager, Environmental, Safety, Health and Security, VES 007596-007597;
- Ralph L. Roberson, President, RMB Consulting & Research Inc., VES 008290-008380;
- Michael Fuchs, Project manager in the Measurements Group in URS Corporation's Austin, Texas Office, VES 007598-7605;
- Delana W. Owen, Franklin Engineering Group, VES 007606-008087;
- Dennis J. Warchol, Veolia Manager of Environmental, Health and Safety, VES 008381-008383;
- Doug Harris, General manager at Veolia ES Technical Solutions, L.L.C., VES 008384-008391;

IV. Conclusion

For the reasons set forth above, Veolia requests that USEPA withdraw the reopening or modify the Draft Permit in accordance with Veolia's comments.

Veolia's comments are offered by:

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