

ILLINOIS POLLUTION CONTROL BOARD

**VEOLIA ES TECHNICAL SOLUTIONS,
LLC**

Petitioner,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent

**PCB 10-50
(Permit Appeal – RCRA)**

JOINT RESPONSE TO BOARD QUESTIONS

NOW COMES Petitioner, VEOLIA ES TECHNICAL SOLUTIONS, LLC ("Veolia"), and Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA") (hereinafter collectively "the Parties") and provide this joint response to questions propounded by the Illinois Pollution Control Board ("Board") attached to the January 5, 2016 Hearing Officer Order entered in the instant matter, as follows.

Counsel for the Parties are committed to addressing the Board's questions regarding the status of this proceeding. Counsel for the Parties also acknowledge the Board's role in adjudicatory matters and the importance of maintaining an orderly docket.

Importantly, as noted below, confidential settlement discussions have been ongoing and Counsel have endeavored to keep the Board Hearing Officer thoroughly apprised of the status while maintaining their respective obligations to ensure the confidentiality of settlement discussions. It is our hope that the information provided below satisfactorily addresses the Board's concerns.

1) Have settlement discussions resolved any conditions disputed in the original petition? Which conditions remain at issue?

Answer: Settlement discussions have resolved a number of conditions disputed in the original petition pending both IEPA and the United State Environmental Protection Agency ("US EPA") approval.

The Illinois EPA Permits section provides the following list regarding the status of permit conditions under appeal. The reference to "MACT" is a designation to indicate permit conditions that may be impacted by integration with maximum achievable control technology ("MACT") standards under Veolia's Title V permit (under review by US EPA) :

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| 1. | Incompatible wastes. | This issue is not resolved. |
| 2. | Inspections. | Illinois EPA believes there has been a negotiated resolution. |
| 3. | Incineration section A.9 –A.13 | This issue is not resolved (risk assessment) |
| 4. | Incineration
Section IV.a.D, IV,a.E, IV.b.D, IV.b.E | This issue is not resolved (MACT) |
| 5. | Flood contingency section VI.1 | Illinois EPA believes there is a negotiated resolution |
| 6. | Incineration section VI.3, VI.4 | This issue is not resolved (MACT) |
| 7. | Subpart X typo | Illinois EPA believes there has been a negotiated resolution |
| 8. | Subpart BB | Illinois EPA believes there has been a negotiated resolution. |
| 9. | Subpart CC | This issue is not resolved (USEPA) |
| 10. | Subpart CC | This issue is not resolved. |
| 11. | Subpart CC | Illinois EPA believes there has been a negotiated resolution. |
| 12. | Subpart CC | Illinois EPA believes there has been a negotiated resolution |
| 13. | Section X Corrective Action | Illinois EPA believes there has been a negotiated resolution |

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| 14. | Attachments G and H Corrective Action | Illinois EPA believes there has been a negotiated resolution |
| 15. | Attachment D | This issue is not resolved (MACT) |
| 16. | Attachment E | Illinois EPA believes there has been a negotiated resolution |

Veolia has received no confirmation of resolution of any of the above issues. However, Veolia believes that it is in agreement with Illinois EPA on many of these issues.

One of the key disputed issues in this appeal is the mercury emission limit that is based on the US EPA's 2007 site specific risk assessment ("SSRA" or "risk assessment"). Veolia is contesting the SSRA on the basis of the consumption rate of fish from the subject lakes by humans that was utilized by US EPA in the SSRA, as well as assumptions made relevant to bioaccumulation of substances of concern in target trophic levels of fish. Further, Veolia believes the SSRA is fundamentally flawed due to various assumptions contained therein including but not limited to the assumption that the studied lakes are a closed system. In negotiations and prior to determining, based upon Illinois Department of Natural Resources' internal documents and other information, that the studied lakes are not a closed system, it was agreed that IEPA and US EPA would entertain consideration of a study of fish from the subject lakes for levels of methyl mercury as a possible alternative risk assessment. In light of determining the studied lakes are an open system, Veolia believes US EPA's SSRA is fundamentally flawed and a scientifically valid risk assessment cannot be conducted. Veolia is willing to keep an open mind on this issue and discuss this issue further with Illinois EPA.

Assumptions that are the basis for the SSRA remain in dispute, as is the completeness of the risk assessment in light of the decision issued by US EPA's Environmental Appeals Board ("EAB") in the matter of *In re: ESSROC Cement Corporation, RCRA Permit No. IND*

005081 542, July 30, 2014 (remanded to include robust uncertainty and conclusion sections or explain why same are not needed).

2) Which party made the most recent settlement proposal? When is a response to that proposal expected? Is a future discussion on settlement scheduled? Can you estimate when a settlement may be reached?

Answer:

Quoting from page 3 of the EAB's ESSROC decision, Section IV, Statutory and Regulatory Framework, the parties offer the following as explanation of the role of the SSRA in this matter:

RCRA section 3005(a) provides for the permitting of new and existing facilities "for the treatment, storage, or disposal of hazardous waste," known as TSD facilities. RCRA also requires the permitting agency to include in each permit for a TSD facility any terms and conditions necessary to protect human health and the environment. RCRA § 3005(c)(3), 42 U.S.C. § 6925(c)(3). EPA has interpreted and applied this statutory provision, known as the RCRA "omnibus authority", as authorizing permit conditions that are more stringent than those specified in other regulations that may apply to the TSD facility. In re Ash Grove Cement Co., 7 E.A.D. 387, 396 (EAB 1997).

TSD facilities that emit air pollutants also are subject to regulation under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671 q. Clean Air Act 112, 42 U.S.C. § 7412, requires EPA to regulate hazardous air pollutants emitted from hazardous waste combustion ("HWC") units based on the maximum achievable control technology ("MACT") for source in each category. Accordingly, where the source of hazardous air pollutants is, as here, a TSD facility, the cement kiln-specific standards of RCRA section 3004 (q), the permitting requirements of RCRA section 3005(a), and the MACT standards in CAA section 112 all apply to the source. [In the instant matter, in that Veolia is a hazardous waste incinerator, the source category is that of hazardous waste incinerator.]

In 2005, EPA promulgated the final rule integrating the RCRA permitting provisions of section 3005 and the national emissions standards for HWC units under CAA section 112. National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 70 Fed. Reg. 59,402 (Oct. 12, 2005) (codified at 40 C.F.R. pt. 63, subpt. EEE) ("HWC-MACT Rule"). The HWC-MACT Rule authorizes the permitting authority to consider on a case-by-case basis during the initial RCRA permit application or renewal process whether to conduct

an SSRA. See 40 C.F.R. §270.10(l)(1) (setting forth factors for permitting authorities to consider when determining the need for an SSRA.) A companion regulation provides, pursuant to the omnibus authority, that if the permitting authority determines as a result of an SSRA or other information that additional conditions are needed beyond those required under the HWC-MACT Rule to ensure protection of human health and the environment, the permitting authority shall include those terms and conditions in the facility's permit/ 40 C.F.R. § 270.32(b)(3).

US EPA has asserted its omnibus authority relative to the Veolia RCRA permit. US EPA's SSRA (also referred to as "risk assessment" in these answers) and Veolia's response in the form of an actual fish study have been and remain a key issue in this appeal.

The following is the Illinois EPA's record of the exchanges regarding the fish study:

August 2011	Original Veolia Fish Plan (FP1) submitted
September 2011	EPA recommendations to IEPA
September 19, 2011	IEPA comments on FP1 to Veolia
November 2011	Veolia Fish Plan 2 submitted
February 1, 2012	EPA recommendations to IEPA on FP2
February 29, 2012	IEPA comments on FP2 to Veolia
May 22, 2012	Veolia Responds to IEPA's February 29 letter
November 8, 2012	EPA sends recommendations to IEPA re: Veolia's responses
August 15, 2013	IEPA sends Veolia responses to Veolia's response to comments on Fish Plan 2

On October 20, 2014, Veolia provided draft comments to Illinois EPA's August 13, 2013 response. The cover from Veolia to those draft comments included the caveat that Veolia had come to realize it would be impossible to overcome, either in its proposed fish study or in US EPA's SSRA for the RCRA permit, the failure to account for the open nature of the system. It had come to light for the parties that this lake system was not a closed system.

The lakes at Frank Holton, which are the body of water that is the subject of the US EPA's SSRA, are actually connected via ditches to the Mississippi River allowing a constant exchange of multiple fish species between lake and river. It is not a static system. This fact

came to light for Veolia after the submission of what is referenced above as "Fish Plan 2" above.

Therefore, Veolia contends that a reliable fish study is impossible because, to the extent the studied fish tested positive for methyl mercury, there is no way to determine whether the fish originated from the river and picked up methyl mercury from the river or elsewhere. Veolia has raised the question as to how the fact that the system is an open system has been taken into account in the US EPA's SSRA. It is Veolia's position that the SSRA suffers the same lapses identified in the ESSROC risk assessment that is the basis of the EAB decision in that permit appeal. The parties have yet to fully explore these issues in negotiations.

Further negotiations have been delayed in an attempt to allow issues that overlap between the Title V determinations and the RCRA permit requirements to be addressed in the Title V context with US EPA. See discussion contained within Answer to #5 below.

It is Veolia's position that the mercury limit US EPA derived for Veolia is based on a scientifically invalid SSRA. Further, Veolia believes the mercury limit fails to take into account Veolia's incinerators' removal efficiencies which were demonstrated in 2008 and 2013 comprehensive performance testing. Veolia is currently meeting the Clean Air Act MACT permit limits for mercury, which without the more stringent requirements that US EPA seeks to achieve in the RCRA permit, would be the regulatory limit required in the Title V framework.

In that Veolia's October 20, 2014 response to Illinois EPA's August 15, 2013 response is labeled "draft", Illinois EPA views the status of Veolia's response to remain outstanding. Illinois EPA's position is that the fish study is necessary if Veolia wishes to proceed with an alternate risk assessment. Veolia believes that to date, in light of the ESSROC decision and the fact that no fish study/SSRA has considered the lakes as an open system, no scientifically valid fish study/SSRA has been conducted that would support the current mercury limit.

The parties are currently looking at dates for an in person settlement discussion. This meeting will be held as soon as possible.

The considered progress that has been made with regard to what will be required to satisfy conditions of the Title V permit, in particular those conditions that overlap with the RCRA permit, is beneficial to negotiations in the instant matter.

The parties need to discuss the issues set forth above regarding the SSRA, and in turn, there is need for discussion as to whether there is a possibility for common ground regarding mercury emissions.

It is not possible, at this juncture, to determine if and when settlement might be obtained.

3) What is the status of the administrative record? The March 29, 2011 hearing officer order describes issues pertaining to the record, but it appears that no update on its status has been provided since then.

Answer: At the time of the March 29, 2011 hearing officer order, Respondent reviewed the record relevant to the issues raised. There was some discussion between the parties at the time. If this matter is to go to hearing, the parties will want to review these questions again to determine if there is an agreement or if the issues regarding the record must be litigated.

4) The March 29, 2011 hearing officer order states that site work was expected to take nine months to complete. Other hearing officer orders mention a fish study (December 14, 2011) and a sampling plan (July 31, 2012). What is the status of these projects? Are they necessary to complete the RCRA permit appeal?

Answer: It is uncertain what the reference to "site work" pertained to in the March 29, 2011 order. See the discussion above in response to Question 2, regarding the necessity and status of the SSRA and the fish study.

5) This permit appeal has been delayed while the petitioner worked to finalize its Title V permit. Describe the status of the Title V permit. Is it necessary to reissue the facility's Title V permit before resolving the RCRA permit appeal?

Answer: Veolia operates three hazardous waste incinerators at its Sauget, IL facility. The nature of the facility requires Veolia to have a Title V permit which is issued by USEPA and a RCRA permit which is issued by IEPA. Veolia's Title V is under review by US EPA. Negotiations regarding Veolia's Draft Title V permit are ongoing between US EPA and Veolia. Veolia indicates that Veolia's Draft Title V permit and Veolia's RCRA Part B permit encompass the same permit conditions (referenced elsewhere in these answers as "MACT impacted conditions") which include:

- Emission Limit for Mercury
- Pre-acceptance Screening Requirements for Mercury
- Incoming Waste Sampling Requirements
- Batch Sampling Procedures
- Exemptions to Waste Sampling Procedures
- Chlorine Feed Rate Limits
- HCl/Cl₂, CO, HC, Particulate Emission Limits
- Operating Permit Conditions
- Waste Feed Limits

The values for these conditions in each of the permits are inconsistent and, at times,

conflict.¹ Depending upon the condition, the facility may comply with a permit condition while simultaneously violate the same condition in the other permit.

Veolia believes such a result is untenable. Therefore, Veolia has been in communications with Senior US EPA Region 5 Officials in an attempt to arrive at agreeable, negotiated conditions that will be placed in both the Title V permit and the RCRA Part B permit.

It is Veolia's contention that given the overlap between the Title V permit and the RCRA Part B permit, no resolution of the RCRA Part B permit appeal can occur until the Title V permit conditions have been resolved.

It is Illinois EPA's contention that discussions can get underway regarding issues relevant to the SSRA, in that the SSRA and mercury levels derived from the SSRA are relevant solely within the context of the RCRA permit and at this juncture, are independent of the Title V permit. Therefore, Illinois EPA's short answer to the question as to whether it is necessary to reissue the facility's Title V permit before resolving the RCRA permit appeal is "no" with the following explanation. 35 Ill. Adm. Code 703 Subpart I was not addressed in Veolia's permit application. Veolia disagrees with Illinois EPA in that Veolia applied for its permit in 1997 and therefore was under no obligation to address 35 Ill. Adm. Code 703 Subpart I which first became effective in 2006. Further, Veolia believes 35 Ill. Adm. Code 703 Subpart I only relates to start-ups, shutdowns, and malfunctions and really has nothing to do with operating permit limits relation to mercury.

Illinois EPA believes this issue could be addressed under 35 IAC 703.320(a) after the permit is issued. However, Veolia believes it could not operate given the conflicting provisions between the RCRA permit and the Title V permit as presently being negotiated.

¹ Veolia and USEPA have tentatively negotiated the values for a number of these conditions as part of the Draft Title V. Permanent values for these conditions will be established if and when the Draft Title V permit becomes final.

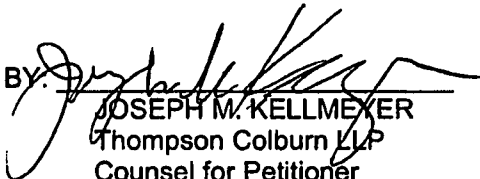
The following appeal issues could be impacted by a MACT permit. However Veolia has neither made application to modify these conditions, nor provided justifications and the proper documentation in accordance with 35 Ill. Adm. Code 703 Subpart I: 5(d) and 5(n). Veolia continues to believe 35 Ill. Adm. Code 703 Subpart I: 5(d) and 5(n) only applies to start-ups, shutdowns and malfunctions.

Both Illinois EPA and Veolia believe the appeal points regarding Conditions IV.a.D, IV.b.D, IV.b.E, VI.3, VI.4 and Attachment D may be impacted by MACT standard's in the facility's Title V permit. Illinois EPA believes this conflict must be handled in a permit modification subsequent to resolution of the instant appeal. Veolia believes it cannot operate while the RCRA and Title V permits conflict. Further, Veolia believes the conflicting provisions between the RCRA permit and the Title V permit as currently negotiated contradict a purpose of renewing such permits which is to ensure regulatory consistency.

Respectfully submitted,

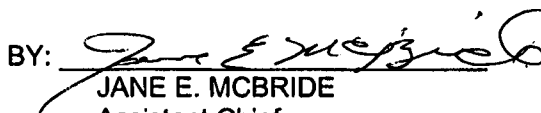
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