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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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July 21, 2008

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The Honorable Stephen L. Johnson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Johnson:

On March 6, 2008, the Environmental Protection Agency (EPA) proposed to exempt Veolia ES Technical Solutions, LLC (Veolia), a hazardous waste incinerator in Port Arthur, Texas, from the ban on importation of polychlorinated biphenyls (PCBs) under Section 6(e)(3) of the Toxic Substances Control Act (TSCA) (73 FR 12053 -12061). The exemption would allow Veolia to import up to 20,000 tons of PCB waste, contaminated at levels up to 500,000 ppm, from Mexico for disposal by incineration at Veolia's facility in Port Arthur, Texas. EPA officials have indicated that the source of most of the PCBs is a Mexican Government-owned electric company. Veolia's petition for import exemption states that it manages the industrial wastes of waste generators in Mexico, including CFE, the Mexican Government-owned electric company, through its Mexican subsidiary, RIMSA.

EPA has determined that PCBs cause significant human health effects, including cancer, disruption of the endocrine system, immune system suppression, skin irritation, and liver damage. Human exposure to PCBs occurs primarily through eating contaminated food and breathing contaminated air.

If EPA were to grant this petition, it would effectively create an open border that would allow all PCB waste from Mexico, and perhaps many other countries, to be disposed of in the United States. The overarching policy of TSCA Section 6(e) is to prohibit the import of PCBs. Under Section 6(e)(3)(B) of TSCA, however, EPA can grant a waiver from this ban for a period of not more than one year only if it finds that: (i) an unreasonable risk of injury to health or the environment would not result; and (ii) good faith efforts have been made to develop a chemical

substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such polychlorinated biphenyl (emphasis added).

EPA Issues a Proposed Finding That Granting Veolia's Exemption Petition Would Not Result in an Unreasonable Risk.

EPA's evaluation of this exemption under the criteria set forth in TSCA (6)(e)(3)(B) appears deficient. First, EPA must determine whether the disposal of 20,000 tons of PCB waste would not result in an unreasonable risk of injury to health or the environment. EPA has apparently determined that there is no unreasonable risk based solely on the fact that Veolia is an EPA-approved PCB disposal facility.

Veolia's petition for exemption cites the PCB import rule (61 FR 11096, March 18, 1996) in support of the claim that the disposal of PCBs in accordance with the TSCA regulations poses no unreasonable risk of injury to health or the environment. EPA attempted to promulgate a final rule, intended to allow parties to continue to import PCBs into the United States for purposes of disposal indefinitely and without interruption. The PCB import rule was determined to be unlawful by the Ninth Circuit in 1997 (*Sierra Club v. EPA*, 118 F. 3d 1324 (9th Cir. 1997)) because it obviated TSCA's requirements for granting an exemption to the import ban under TSCA Section 6(e)(3)(B)(i) and (ii). The court noted: "EPA argues that it would be better able to protect the populace of this country from PCB contamination if it were allowed to import foreign PCB contaminants into our borders for disposal. However, Congress has spoken clearly on the subject and the regulation violates the provisions of the statute."

We question whether a permit for an incinerator that has been granted based on a trial burn of PCBs or other compounds, which was conducted during a short time period several years ago, is determinative of "unreasonable risk to human health or the environment" for the purpose of TSCA Section 6(e)(3)(B). The statutory standard should be evaluated in the context of the affected community and informed by a specific determination of the actual risks presented. The plain language of the statutory criteria for this exemption requires EPA to determine the actual risk that would result from granting this petition.

We understand that serious concerns were raised during a public hearing held on June 19, 2008, about the impact this exemption would have on the health and safety of residents living in Port Arthur, Texas. Historically, the Port Arthur area has had significant concentrations of petrochemical, maritime, and other industrial activity, in addition to the Veolia facility, that incinerates domestic PCBs and other hazardous materials. Port Arthur residents have voiced concerns that they are already overburdened from toxic chemicals in the air.

The EPA's most recent Toxics Release Inventory data reveals that 26.4 million pounds of toxic compounds were either released or disposed of in Jefferson County, Texas, in which Port Arthur is located. That total places Jefferson County among the 20 U.S. counties with the

highest totals of toxics releases. The Beaumont-Port Arthur three-county area is currently in non-attainment of the Clean Air Act's eight-hour ozone air quality standard, due to emissions of nitrogen oxides (NO_x) and volatile organic compounds (VOCs). In addition, Port Arthur is home to 192 EPA-regulated hazardous waste handlers, among other regulated facilities. Additionally, Port Arthur is home to three active Superfund sites, with at least seven others in surrounding areas in Jefferson County.

Jefferson County has a 2006-estimated population of 243,914, with 57,042 in the city of Port Arthur. According to 2000 census data, African-American residents comprise 43.7 percent of the city population and Latinos 17.5 percent. The median household income totals \$26,455, with 25 percent of households below the U.S. poverty line. According to the Texas Cancer Registry, males and females in Jefferson County experienced cancer mortality rates 14.8 percent and 8.3 percent higher than the state average, respectively, for years 2000 through 2004, a difference that is statistically significant.

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," requires each Federal agency to make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States. It certainly appears that Port Arthur is an environmental justice community within the scope of the Executive Order.

We are also troubled that EPA would propose granting an exemption to a facility with such a poor compliance record with State and Federal environmental laws. Specifically, the Port Arthur facility's compliance record with the Texas Council on Environmental Quality (TCEQ) during the past five years shows significant violations of the Clean Air Act. These violations include, but are not limited to, deviations from pollution control requirements, failure to maintain the minimum temperature in its kiln at the required permit limit of 1,391 degrees Fahrenheit, failure to notify the TCEQ regional office of reportable emissions events at the incinerator, and failure to comply with all of the requirements of a Federal Operating Permit.

We also note that EPA's Enforcement and Compliance History Online (ECHO) database lists the Veolia Port Arthur facility as being in significant noncompliance with the Solid Waste Disposal Act during the third and fourth quarters of 2005, and indicates that this facility was in violation of certain hazardous waste regulations in 2006 and 2007. EPA's proposal to grant Veolia this exemption contains no mention of Veolia's problematic compliance record. We do not understand how EPA could have overlooked Veolia's deficient compliance history, especially the Clean Air Act violations involving operation of Veolia's incinerator, in proposing to grant this petition.

EPA Issues a Proposed Finding That Veolia's Exemption Petition Demonstrates Good Faith Efforts to Identify a Substitute for PCBs.

To meet the second criterion under TSCA Section 6(e)(3)(B), EPA must determine if good faith efforts have been made to develop an alternative chemical substance that could be used as a substitute for PCBs and does not present an unreasonable risk of injury to health or the environment. However, EPA has chosen to apply a new standard that reads as follows:

EPA believes that it is appropriate to apply the standard in a way that is relevant to the particular exemption requested. Therefore, EPA believes that to effectuate Congress' intent, the relevant "good faith" issue for an exemption request to import PCBs for disposal is whether the disposal of the waste could and/or should occur outside the United States. (73 FR 12053, at 12056)

EPA has apparently evaluated Mexico's PCB disposal capacity and the potential risk and cost of shipping this waste to Europe for disposal and concluded that Veolia has met this new interpretation of TSCA Section 6(e)(3)(B)(ii). It appears that EPA is adopting a criterion that rests on a determination of what is the cheapest disposal option for the petitioner. This standard finds no support in the legislative history or the statutory scheme created by Congress.

EPA's Proposal to Grant Veolia's Exemption Petition Provides for an Alternative Disposal Option.

We also note that EPA's proposed exemption contains a provision that was not requested by Veolia in its petition. In the case of a Port Arthur facility shutdown, this provision would grant Veolia the broad authority to arrange for alternative disposal of this waste at another TSCA-approved disposal facility in the United States, such as CWM Chemical Services, LLC, Model City, New York; Wayne Disposal, Inc., Belleville, Michigan; Clean Harbors, Inc., Deer Park, Texas; Chemical Waste Management of the Northwest, Arlington, Oregon; Chemical Waste Management, Kettleman City, California; and Clean Harbors Aragonite, LLC, Aragonite, Utah.

We are interested in obtaining further information pursuant to Rules X and XI of the Rules of House of Representatives to assist us in evaluating EPA's proposal to exempt Veolia from the ban on the importation of PCBs under TSCA. Therefore, please provide responses to the attached questions by no later than Monday, August 4, 2008.

If you have any questions, please contact us or have your staff contact Caroline Ahearn with the Committee on Energy and Commerce staff at (202) 225-2927.

Sincerely,



John D. Dingell
Chairman



Gene Green
Chairman
Subcommittee on
Environment
and Hazardous Materials



Hilda L. Solis
Vice Chair
Subcommittee on
Environment
and Hazardous Materials

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable John Shadegg, Ranking Member
Subcommittee on Environmental and Hazardous Materials

Attachment

1. EPA has determined that granting this petition will benefit the United States and the environment because it avoids the risk of long-term storage in Mexico. Where is the support in the legislative history of TSCA Section 6 (e)(3)(B) that the determination of unreasonable risk rests on the harm to citizens of foreign countries as opposed to the risk to citizens of the United States that live near the PCB disposal location?
2. What are the ambient levels of carcinogenic hazardous air pollutants and non-carcinogenic hazardous air pollutants in Port Arthur?
3. According to EPA's Toxics Release Inventory (TRI) Database, Veolia's 2006 TRI report indicates that it released 1,933 pounds of PCB emissions into Port Arthur, Texas. In evaluating Veolia's petition for exemption, did EPA consider the impact of Veolia incinerating more PCBs on its current level of emissions of PCBs, dioxins, and other toxic chemicals to determine whether these additional emissions will pose an unreasonable risk of injury to health or the environment? Does EPA know what caused 1,458 pounds of these emissions to be fugitive?
4. EPA's proposed exemption grants Veolia the authority to arrange for alternative disposal of this waste at another TSCA-approved facility in the United States. How is EPA able to make specific findings that disposal at these other facilities would not result in unreasonable risk of injury to health or the environment? Does EPA intend to provide the citizens who live near these facilities an opportunity for a public hearing?
5. EPA's proposal to exempt Veolia states that "no environmental justice issues are associated with the proposed rule." (73 FR 12053, at 12060). Is it true that EPA obtained information at the June 19, 2008, public hearing on this petition indicating that the Port Arthur community is overburdened with toxic pollution from the dense concentration of chemical plants and oil refineries that surround the town, and that the majority of residents are minorities with average household incomes that are considered low?
6. In Response to Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," did EPA conduct an environmental justice assessment on this exemption petition to determine if there would be any disproportionately high and adverse human health or environmental effects on the Port Arthur community? Please provide us with any environmental justice analysis that was conducted on this proposal. Additionally, did EPA evaluate the current levels of toxic pollution in and around the Port Arthur community? Did EPA measure the cumulative risk to the Port Arthur community of exposure to multiple contaminants? Did EPA factor the health and environmental impacts on the residents of the Port Arthur community from the additional burning of 20,000 tons of PCB waste in Veolia's incinerator into any risk analysis that it may have conducted?

7. Veolia's petition for exemption states that it will transport PCB wastes by truck from various RIMSA facilities in Mexico. Please identify the persons that generated the PCB wastes located at these facilities and the amount of PCB wastes from each source.
8. We understand that Veolia would transport the PCB waste at issue approximately 460 miles from Mexico to the Veolia facility in Port Arthur, Texas. Since 1996, how many releases of hazardous materials have occurred during transport? Did EPA evaluate Veolia's proposed transport route and the safety record of the transporters? Did EPA determine whether Veolia is in compliance with Department of Transportation hazardous materials requirements? If so, please provide the basis for this determination.
9. Did EPA evaluate whether other PCB disposal options were available in Canada, Latin America, South America, or the Caribbean, or evaluate the use of on-site disposal technologies? What are the alternative PCB disposal facilities in Canada and the other regions referenced above?
10. With regard to Mexico's capacity to dispose of PCB waste, what are the PCB disposal facilities in Mexico and their respective disposal capacities? Did EPA evaluate whether Veolia could dispose of this waste in Mexico using mobile units from the United States or elsewhere?
11. With regard to the Veolia facility located in Port Arthur, Texas, for the past five years, please provide the following information related to its compliance with Federal and State environmental laws:
 - a. Please identify all facility permits by statute, identification number, status (if active or inactive), and permit expiration date.
 - b. Please provide a list of all Federal and State inspections at the facility for the past five years, and for each inspection specify:
 - (1). The date of the inspection, the lead agency, under what environmental authority the inspection was conducted, and the identification number.
 - (2). If any State or Federal enforcement action was taken as a result of the inspection: the type of enforcement action, the date the enforcement action was taken, the nature of the violations, and the amount of any penalties that were assessed.
12. Has EPA received any complaints from customers of the Veolia facility in Port Arthur, Texas regarding this facility's improper management of waste? If so, please identify the nature of the complaint.