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December 20, 2021

SUBMITTED VIA EMAIL

Re: Comments Submitted on Behalf of Florida Rising on Draft Title V Permit No. 0250348-013-AV, Proposed in Response to Application for Renewal of the Title V Permit for the Miami-Dade County Resources Recovery Facility

Dear Mr. Lauder,

Please accept these comments submitted by Earthjustice on behalf of Florida Rising regarding Draft Title V Permit No. 0250348-013-AV[1] for the Miami-Dade County Resources Recovery Facility[2] (also referred to as the "Covanta Incinerator," "facility," or "source").

Florida Rising is a grassroots organization whose mission is to advance economic, racial, and climate justice across Florida, especially on behalf of Black and brown communities, low-income communities, and communities disproportionately burdened by environmental harms. In Doral and throughout the state, Florida Rising fights for healthy environments free from toxic pollution and for a sustainable, just transition to clean energy that equitably centers the communities it serves.

In addition to the legal deficiencies in the Draft Title V Permit here, environmental justice, public health, and climate change considerations require that the permit be denied.

EXECUTIVE SUMMARY

Almost 80% of all municipal solid waste incinerators in the United States are in communities of color or low-income communities, thus exacerbating the environmental burdens these communities must bear. The Covanta Incinerator is no different: of the population within three miles of the facility, 92% are minorities and 36% live below the poverty line. The Covanta Incinerator burdens the surrounding community by emitting pollutants known to cause cancer, respiratory and reproductive health risks, and increased risk of death, among other health impacts.

Furthermore, though labeled a clean or renewable source of energy, incinerators are anything but—they are the most emission-intensive form of electricity production in the United

[1] *See* APPLICATION FOR RENEWAL OF TITLE V AIR OPERATION PERMIT, Miami-Dade County Resources Recovery Facility, Submitted to: Florida Department of Environmental Protection (Aug. 1, 2021).
[2] The Miami-Dade County Resources Recovery Facility is located at 6990 NW 97th Avenue, Miami, Florida.

States. They emit more greenhouse gases per unit of electricity than any other power source, at a time when the climate crisis demands reductions in greenhouse gas emissions, especially in a state like Florida that is on the frontlines of the climate crisis. The toxic ash that is the byproduct of incineration further threatens human health and altogether makes incineration an outdated and dirty form of energy.

Incinerators are subject to the Clean Air Act's (CAA's, or the Act's) Title V program, which plays a critical role in establishing the requirements applicable to a facility's air pollution emissions. The purpose of the Title V operating permit program is to ensure air quality control requirements are appropriately applied to a facility's emission units and set forth in a single document, so that the facility complies with requirements of the Act and in particular, Title V.

Notwithstanding the fact that incineration is contrary to the public good, the draft Title V renewal permit here falls short of fulfilling legal requirements set forth by the CAA, regulations, and other laws. The revised permit fails to require the Covanta Incinerator to conduct monitoring sufficient to determine whether it is complying with its emission limitations, contains compliance loopholes regarding excess emissions and fuels, and fails to include all applicable requirements. Regarding monitoring, the requirements in the proposed permit are woefully inadequate for ensuring compliance. As a result, the draft Title V renewal permit fails to provide accountability and transparency to the public, and it must not be issued in its current format.

The draft permit also attempts to exempt the Covanta Incinerator from odor requirements on grounds that they are not federally enforceable—an exemption not lawfully allowed. Given the importance of controlling odor for the surrounding community, this unlawful exemption seems solely designed to give Covanta a free pass to continue violating the law and disrupting the lives of the residents neighboring the incinerator.

The draft permit also unlawfully gives the Department of Environmental Protection (DEP) the authority to excuse violations of the permit. Such discretion is not consistent with the requirements of the CAA. The permit must also not be issued in its current form as it unlawfully allows Covanta to violate its emission limitations during startup, shutdown, and malfunction events. Emission limitations are meaningless—and unlawful—if they can always be excused.

For all the reasons contained in these comments, DEP cannot lawfully issue the permit in its current form, and it must therefore be denied. At a minimum, the facility must be shut down until all legal deficiencies in the draft permit are remedied.

Due to significant public interest in the Covanta Incinerator and public opposition to renewal of the Title V permit,[3] Florida Rising further requests a public hearing in this matter. A public hearing would allow Florida Rising and members of the community to address DEP directly on the ways that the incinerator impacts them, beyond what is captured in this comment letter.

[3] *See* Florida Rising et al., "Re: Comments and Request for Public Hearing on Draft Title V Permit No. 0250348-013-AV" ("Community Sign-on Letter") (Dec. 20, 2021) (Attachment 1); City of Doral's 311 Odor Complaint Log (Jan. 1, 2016 to Sept. 8, 2021) (redacted) ("Odor Complaint Log") (Attachment 2); Samantha Gross, *Doral mayor to county: Don't extend lease at odoriferous Covanta recycling plant*, Miami Herald (Aug. 26, 2021), https://www.miamiherald.com/article253716598.html (Attachment 3).

TABLE OF CONTENTS

ACRONYMS USED THROUGHOUT COMMENTS

BACT – Best Available Control Technology

CAA – Clean Air Act

DEP – Florida Department of Environmental Protection

EPA – Environmental Protection Agency

HAP – Hazardous Air Pollutants

MWC – Municipal Waste Combustors

NSPS – New Source Performance Standards

PM – Particulate Matter

PSD – Prevention of Significant Deterioration

SIP – State Implementation Plan

SSM – Startup, Shutdown, and Malfunction

I. BACKGROUND

A. Burning Trash is a Toxic Way to Manage Waste

With 11 incinerators, Florida has the most municipal solid waste incinerators of any state in the United States, and 10 out of 11 of them are within environmental justice communities.[4] With half-a-million Floridians living within a three-mile radius of a constant stream of harmful pollutants, [5] it is long overdue for Florida to consider safer, alternative solutions for waste management.

Incineration does not make waste disappear—it converts waste into air pollution and toxic ash that contaminate the surrounding communities, which are often communities of color and low-income. And while incinerator companies label incineration as clean energy, it is one of the most polluting and most expensive ways to generate energy.[6]

Waste incinerators burn large amounts of waste in giant combustion chambers, converting the waste into air emissions and toxic ash. Some incinerators use the heat from this burning to produce steam that turns turbines to generate electricity—similar to how coal plants produce electricity. Though the incineration industry claims that this energy is clean and renewable, incinerators are the most emission-intensive form of generating electricity in the U.S. today and can emit more air pollutants than coal plants per unit of energy, up to 18 times more lead, 14 times more mercury, 6 times more smog-forming nitrogen oxides, 5 times more carbon monoxide, 4 times more cadmium and hydrogen chloride, and 2.5 times more greenhouse gases.[7]

Incinerator emissions are highly unpredictable because what they burn varies depending on what waste happens to be collected at a given time.[8] The diesel trucks that transport waste to

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[4] Tishman Env't and Design Ctr. & Global Alliance for Incinerator Alternatives (GAIA), *The Cost of Burning Trash: Human and Ecological Impacts of Incineration in Florida*, 1 (2020), https://static1.squarespace.com/static/5d14dab43967cc000179f3d2/t/5fc686311972c46e3c8167d1/1606846003793/The+Cost+of+Burning+Trash-+All+5+states.pdf ("The Cost of Burning Trash") (Attachment 4)

[5] *Id*. at 2 ("491,603 people live within a three-mile radius of Florida's eleven incinerators[.]")

[6] Earthjustice *et al*, *New Jersey's Dirty Secret: The Injustice of Incinerators and Trash Energy in New Jersey's Frontline Communities*, 3 (2021), https://earthjustice.org/sites/default/files/files/nj-incinerator-report_earthjustice-2021-02.pdf ("The Injustice of Incinerators") (Attachment 5)

[7] *Id*. at 4 (citing New York State Department of Environmental Conservation, "Re: Matter of the Application of Covanta Energy Corporation for Inclusion of Energy from Waste Facilities as an Eligible Technology in the Main Tier of the Renewable Portfolio Standard Program," 3-7, App. A Fig. 3, 6, (Aug. 19, 2011), ("NYSDEC Comments") https://waterfrontonline.files.wordpress.com/2017/12/deccommentsoncovantaaugust2011.pdf (Attachment 6); Attorney General Eric T. Schneiderman, Comments "In the Matter of the Application of Covanta Energy Corporation for Modification of the List of Eligible Resources Included in the New York Main Tier of New York's Renewable Portfolio Standard Program to Include Energy From Waste (EfW) Technology," 10-16, (Aug. 19, 2011), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BC16488AD-4FB5-477B-95A9-6C7797FC7EFD%7D (Attachment 7); Environmental Integrity Project, *Waste-To-Energy: Dirtying Maryland's Air by Seeking a Quick Fix on Renewable Energy?*, 3-9 (2011), https://web.archive.org/web/20131217055632/http://www.environmentalintegrity.org/documents/FINALWTEINCINERATORREPORT-101111.pdf (Attachment 8); Neil Tangri, *Waste Incinerators Undermine Clean Energy Goals, Global Alliance for Incinerator Alternatives*, 5 (2021), https://doi.org/10.31223/X5VK5X) (Attachment 9)).

[8] *Id*. (citing Ana Isabel Baptista & Adrienne Perovich, *U.S. Municipal Solid Waste Incinerators: An Industry in Decline*, TISHMAN ENV'T AND DESIGN CTR., 38-39 (2019), https://static1.squarespace.com/static/5d14dab43967cc000179f3d2/t/5d5c4bea0d59ad00012d220e/1566329840732/CR_GaiaReportFinal_05.21.pdf) (Attachment 10)).

incinerators also spew harmful pollutants into the surrounding areas.[9] And the ash that incinerators produce can contain toxic chemicals like lead, cadmium, and dioxins—so much so that the ash may need to be disposed of as hazardous waste, even if the waste was non-hazardous before it was incinerated.[10] Incinerators send this ash to landfills or to be used in products like concrete to build roads, where it can continue to harm communities.[11]

Pollution from incinerators can cause myriad, serious health impacts, such as respiratory problems; lung or skin cancer; non-Hodgkin's lymphoma in adults; nasal and eye irritation; an increase in the risk of miscarriages, stillbirth, and preterm birth; kidney disease; high blood pressure; and fatigue in children.[12] Furthermore, exposure to pollutants such as particulate matter (PM) from incinerators can increase the risk of death from Covid-19.[13]

More specifically, significant health impacts of concern from the Covanta Incinerator's emissions are as follows:

- *Volatile Organic Compounds (VOC)*. Breathing VOCs can irritate the eyes, nose, and throat; can cause nausea and difficulty breathing; and can damage the central nervous system and other organs. Some VOCs can cause cancer.[14]
- *Fine Particulate Matter (PM2.5)*. The size of particles is directly linked to their potential for causing health problems. Small particles less than 10 micrometers, and especially less than 2.5 micrometers, in diameter pose the greatest problems because they can go deep into a person's lungs and may even get into the bloodstream. Exposure to such particles can affect both the lungs and heart. Numerous scientific studies have linked particle pollution exposure to a variety of problems, including premature death in people with heart or lung disease; nonfatal heart attacks; irregular heartbeat; aggravated asthma; decreased lung function; and increased respiratory symptoms, such as irritation of the airways, coughing or difficulty breathing. People with heart or lung diseases, children, and older adults are the most likely to be affected by particle pollution exposure.[15]
- *Hydrogen Fluoride*. Hydrogen fluoride (also known as fluoric acid, hydrofluoride, hydrofluoric acid, and fluorine monohydride) is a serious systemic poison that is highly corrosive. Its severe and sometimes delayed health effects are due to deep tissue penetration by the fluoride ion. The surface area of the burn is not predictive of its effects. The systemic effects of hydrogen fluoride are due to increased fluoride

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[9] *Id*. (citing Global Alliance for Incinerator Alternatives (GAIA), *Pollution and Health Impacts of Waste-to-Energy Incineration*, (2019), https://www.no-burn.org/wp-content/uploads/Pollution-Health_final-Nov-14-2019.pdf) (Attachment 11)).

[10] *Id.* (citing National Research Council, *Waste Incineration and Public Health*, NAT'L ACADEMIES PRESS, 53-55, 64-65 (2000), https://www.nap.edu/catalog/5803/waste-incineration-and-public-health) (Attachment 12)).

[11] *Id.*

[12] The Injustice of Incinerators at 4; The Cost of Burning Trash at 2.

[13] Xiao Wu et al., *Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis*, 6 SCI. ADVANCES eabd4049 (2020), https://www.science.org/doi/10.1126/sciadv.abd4049 (Attachment 13).

[14] EPA, "Volatile Organic Compounds' Impact on Indoor Air Quality," "Health Effects," https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality#Health_Effects (last visited Dec. 14, 2021).

[15] EPA, "Health and Environmental Effects of Particulate Matter (PM)," https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited Dec. 14, 2021).

concentrations in the body which can change the levels of calcium, magnesium, and potassium in the blood. Other adverse effects include severe skin, eye, and mucous membrane irritation; respiratory tract irritation and hemorrhage; nausea, vomiting, gastric pain; cardiac arrhythmia; destruction of deep tissues when fluoride ions penetrate the skin; hypocalcemia, which leads to tetany, decreased myocardial contractility, and possible cardiovascular collapse; and hyperkalemia, which has been suggested to cause ventricular fibrillation leading to death.[16] The primary health effects of acute fluorine inhalation are nasal and eye irritation (at low levels), and death due to pulmonary edema (at high levels).[17]

- *Sulfuric Acid Mist*. Sulfuric acid (H_2SO_4) is a corrosive substance, destructive to the skin, eyes, teeth, and lungs. Severe exposure can result in death.[18]
- *Arsenic*. Arsenic is highly toxic, ranking first on the 2019 Agency for Toxic Substances and Disease Registry (ATSDR) priority list of 275 hazardous substances.[19] Because it targets widely dispersed enzyme reactions, arsenic affects nearly all organ systems. Arsenic can cause lung and skin cancers and may cause other cancers.[20] Arsenic is absorbed through the lungs when inhaled. Small particulate matter, acting as a sponge, transports the arsenic compounds and other soluble metals into the smallest chambers of the lung where they can be directly absorbed into the bloodstream. Recent studies confirm linkages with low dose effects, including cardiovascular effects; increased incidence of metabolic disorders, including diabetes; decreased lung function; impaired immune functions; and increased infections. Arsenic also acts as a generalized neurotoxicant. Effects on the developing fetus, infants, and children at very low exposure levels point to arsenic's role in epigenetic changes in the programming of fetal development and later neurodevelopment. There is also evidence that arsenic causes endocrine disruption. Early life exposures increase risk for later development of cancer of the liver, skin, bladder and lungs at risk levels greater than for adults who exposed to arsenic. Early life exposures also lead to decreased cognitive ability (IQ), a risk that is exacerbated when combined with exposure to other toxic chemicals, such as lead. Other impacts include harmful birth effects such as low birth weight, higher infant mortality, and decreased fetal growth; increased risk of infection in infants; impaired immune response issues; and neurobehavioral effects and development of behavioral disorders.[21]

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[16] Oregon Physicians for Social Responsibility et al., "Re: Covanta Marion, Inc's Proposed Title V Air Quality Permit Renewal," 24 (Nov. 18, 2019) ("Oregon PSR Comment Letter") (Attachment 14); *see generally*, EPA, *Hydrogen Fluoride (Hydrofluoric Acid)*, (2016), https://www.epa.gov/sites/default/files/2016-10/documents/hydrogen-fluoride.pdf.

[17] Agency for Toxic Substances and Disease Registry (ATSDR), *Fluorides, Hydrogen Fluoride, and Fluorine: Health Effects*, 33 (2003), https://www.atsdr.cdc.gov/toxprofiles/tp11-c3.pdf.

[18] *See generally*, ATSDR, *Public Health Statement for Sulfur Trioxide and Sulfuric Acid*, (1998), https://www.atsdr.cdc.gov/ToxProfiles/tp117-c1-b.pdf.

[19] *See* ATSDR, "ATSDR's Substance Priority List," https://www.atsdr.cdc.gov/spl/index.html (last updated Jan. 17, 2020).

[20] ATSDR, "What are the Physiologic Effects of Arsenic Exposure?," https://www.atsdr.cdc.gov/csem/arsenic/physiologic_effects.html (last visited Dec. 15, 2021).

[21] Oregon PSR Comment Letter at 22-23; *see generally*, EPA, *Arsenic Compounds*, (2021), https://www.epa.gov/sites/default/files/2021-04/documents/arsenic_april_2021.pdf.

- *Beryllium*. Beryllium can be harmful if you breathe it in. The effects depend on how much you are exposed to and for how long. Long-term exposure to beryllium can increase the risk of developing lung cancer or lung damage.[22]
- *Nitrogen Oxides (NO_X)*. Nitrogen oxides are a precursor to ground-level ozone, which is associated with respiratory disease and asthma attacks. NO_X also reacts with ammonia, moisture, and other compounds to form particulates, which can cause and/or worsen respiratory diseases, aggravate heart disease, and lead to premature death.[23]
- *Sulfur Dioxide (SO_2)*. Exposure to sulfur dioxide affects the respiratory system. High levels of acute exposure can cause burning of the nose and throat, breathing difficulties, and severe airway obstruction. Long-term exposure to persistent levels of sulfur dioxide can affect lung function. Asthmatics are also sensitive to the respiratory effects of low concentrations of sulfur dioxide. Long-term studies surveying large numbers of children indicate that children who have breathed sulfur dioxide pollution may develop more breathing problems as they get older, may make more emergency room visits for treatment of wheezing fits, and may get more respiratory illnesses than other children. Children with asthma may be especially sensitive to low concentrations of sulfur dioxide.[24]
- *Mercury (Hg)*. Mercury is a potent neurotoxin, ranking third on the 2019 Agency for Toxic Substances and Disease Registry (ATSDR) priority list of 275 hazardous substances.[25] Mercury concentrates in fetal blood as it crosses the placenta. Neurotoxin effects may be increased by synergistic action when mercury combines with other common environmental toxins (such as lead, manganese, polychlorinated biphenyls PCBs, or pesticides), which can be particularly harm to children. Prenatal exposure causes disruption of brain development by inhibiting critical neuronal and glial cell division, global disruption of neuronal migration and disruption of the endocrine system—all conditions associated with autism; attention deficit hyperactivity disorder; smaller cerebellar volume; poorer visual recognition; IQ decline; decreased vocabulary; decreased visual motor ability; and decreased general cognition, memory, and verbal skills.[26]
- *Cadmium*. Cadmium is a highly toxic metal with a very long half-life of 20 to 30 years in humans. It accumulates in soft tissues, kidneys, and the liver. Evidence suggests that cadmium affects DNA repair and cell signaling and control. These effects lead to kidney damage, cancer, mutations, damage to hormone regulating mechanisms, reproductive disorders, and problems with cellular differentiation.

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[22] ATSDR, "ToxFAQs™ for Beryllium," https://wwwn.cdc.gov/TSP/ToxFAQs/ToxFAQsDetails.aspx?faqid=184&toxid=33 (last visited Dec. 15, 2021); *see generally*, EPA, *Beryllium Compounds*, (2000), https://www.epa.gov/sites/default/files/2016-09/documents/beryllium-compounds.pdf.

[23] *See generally*, EPA, "Basic Information about NO_2" "Effects of NO_2 – Health effects," (discussing both NO_2 and NOx impacts), https://www.epa.gov/no2-pollution/basic-information-about-no2 (last visited Dec. 15, 2021).

[24] *See generally*, EPA, "Sulfur Dioxide (SO_2) Pollution," https://www.epa.gov/so2-pollution (last visited Dec. 15, 2021); *see also*, Oregon PSR Comment Letter at 21-22.

[25] *See* ATSDR, "ATSDR's Substance Priority List," https://www.atsdr.cdc.gov/spl/index.html (last updated Jan. 17, 2020).

[26] *See generally*, EPA, "Mercury," https://www.epa.gov/mercury (last visited Dec. 15, 2021); *see also*, Oregon PSR Comment Letter at 22.

Cadmium can also cause cancer in the bladder, breast, and pancreas; and exposure to low concentrations of cadmium is associated with effects on bone health, including increased risk of osteoporosis and fractures. Cadmium was implicated in itai-itai disease, especially in women, from exposure to industrially contaminated water: they suffered osteomalacia (softening of the bones) and osteopenia (decreased bone mineral content and density). Cadmium is also linked to neurodevelopmental impacts: children who have higher urinary cadmium concentrations may have increased risk of having a learning disability. Cadmium exposure can also lead to an increased risk of emotional disability. Cadmium also causes endocrine, reproductive, and other effects; it mimics estrogen and so is an endocrine-disrupting chemical. In animal studies, it affects male reproduction, and it causes decreased birth weight in humans. Other possible risks of cadmium exposure include effects on cellular aging.[27]

- *Dioxins/Furan and Dioxin-like Polychlorinated biphenyls (PCBs)*. Dioxins and furans are by-products in the manufacture of other chemicals or products. Dioxins form whenever chlorine-containing compounds are burned or treated with catalysts in the presence of organic material. Airborne dioxin can travel great distances, eventually settling onto soil, plants, and water. Dioxin dissolves poorly in water and it does not evaporate readily. Since dioxin does not react with oxygen or water and is not broken down by bacteria, it persists in the environment for long periods of time, making it a "persistent organic pollutant." Dioxins cause a spectrum of morphological and functional developmental deficits including fetal death, thymic atrophy, birth defects (structural malformations), delayed effects on the genitourinary tract, adverse behavioral effects, and developmental delay.[28]

The criteria and hazardous air pollutant (HAP) emissions from the Covanta Incinerator and other sources in Miami-Dade County is especially disturbing considering the large amount of people with pre-existing medical conditions, which put them at a higher risk for air pollution-induced health impacts.[29] Out of a total county population of 2,716,940, it is estimated that:

- 36,640 children suffer from pediatric asthma;
- 161,969 from adult asthma;
- 156,612 from COPD;
- 1,484 from lung cancer; and
- 183,288 from cardiovascular disease.[30]

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[27] *See generally,* EPA, "Cadmium Compounds (A)," https://www.epa.gov/sites/default/files/2016-09/documents/cadmium-compounds.pdf (last visited Dec. 15, 2021)*; see also,* Oregon PSR Comment Letter at 23-24.

[28] *See generally*, EPA, "Dioxin," https://www.epa.gov/dioxin (last visited Dec. 15, 2021); *see also*, Oregon PSR Comment Letter at 24-25.

[29] Moreover, given testing for HAPs conducted at a similar Covanta MWC, the above list is likely incomplete as Florida fails to require testing for all HAPs. *See, e.g.*, State of Oregon Department of Environmental Quality, *2016 Air Toxics Emissions Inventory,* (2020), https://www.deq.state.or.us/AQPermitsonline/24-5398-TV-01_ATEI_2016.PDF (air toxics emissions inventory for Covanta Marion, Inc requiring testing for HAPs) (Attachment 15).

[30] American Lung Association, *State of the Air 2021*, 65 (2021) https://www.lung.org/getmedia/17c6cb6c-8a38-42a7-a3b0-6744011da370/sota-2021.pdf (Attachment 16).

Furthermore, the county has 549,679 people under the age of 18 and 452,607 over the age of 65—two age groups in which people are at a higher risk of air pollution-induced health effects.[31] Finally, to put these numbers in context, there are approximately 84,254 people living within three miles of the Covanta Incinerator in Miami-Dade County.[32] Therefore, there is considerable evidence that significant at-risk populations reside in the vicinity of the incinerator.

Precisely which communities this source impacts with air emissions is unknown, as DEP failed to make available in its proposed permit documents any testing of air, water, or soil in the surrounding area. A National Academy of Science Press consensus report notes that the dispersion of toxins into the environment depends on a host of factors, and although most toxins wind up in air, water, or soil within a 10 km radius, some are much more broadly dispersed, up to a regional scale over hundreds of kilometers.[33] Given this lack of certainty about the neighborhoods impacted by the Covanta Incinerator, we consider the potentially exposed population to include a 5 to 6.2 mile (10 km) radius.

Contrary to being a renewable, clean source of energy, incinerators are one of the most polluting sources of energy from start to finish: from the diesel trucks transporting waste to the incinerator, to the harmful emissions incineration produces, to the toxic ash created as a byproduct. The serious health risks that incinerators pose—disproportionately so for communities of color and low-income communities—require a denial of this Title V permit.

B. Incinerators Exist at the Intersection of Environmental Injustice and Systemic Racism

In the United States, race is a significant predictor of living near a toxic facility.[34] This is not coincidental, but rather, due to several historical factors rooted in racism. Industrial zoning in urban and more densely populated areas and discriminatory redlining policies, which restricted access to home loans and mortgages, segregated cities and caused divestment in minority communities.[35] Meanwhile, industrial (polluting) "hot spots" developed on marginal lands where low-income residents and residents of color were forced to reside, leading them to be defined as environmental justice communities, or communities in which low-income and minority residents suffer cumulative impacts from environmental hazards; unhealthy land uses; and a lack of health, economic, or social benefits.[36] Among other conditions, residents of environmental justice communities suffer from elevated blood levels, asthma, preterm births, and increased cardiovascular disease-related morbidity and mortality rates.[37]

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[31] *Id.*; *see also*, American Lung Association, "Health Effects of Particle Pollution, Who is Most at Risk from Particle Pollution?," https://www.lung.org/research/sota/health-risks (last visited Dec. 15, 2021) (Attachment 17).
[32] *See* EPA, EJSCREEN Report for three-mile radius surrounding the Covanta Incinerator at 1 (Dec. 16, 2021), ("EJSCREEN Report") (Attachment 18).
[33] National Research Council Committee on Health Effects of Waste Incineration, *Waste Incineration and Public Health, Environmental Transport and Exposure Pathways of Substances Emitted from Incineration Facilities*, 73 (2000), https://www.ncbi.nlm.nih.gov/books/NBK233629/pdf/Bookshelf_NBK233629.pdf (Attachment 19).
[34] The Injustice of Incinerators at 12. *See* Robert D. Bullard, Ph. D., et al, *Toxic Wastes and Race and Twenty 1987-2007*, (2007) https://www.nrdc.org/sites/default/files/toxic-wastes-and-race-at-twenty-1987-2007.pdf (landmark environmental justice study finding that race was the strongest variable in predicting the location of waste facilities, based on studies conducted in 1987 and ten years later in 2007) (Attachment 20).
[35] Baptista & Perovich, *supra* note 8, at 13-14.
[36] *Id.*
[37] *Id.* at 34.

As to the siting of incinerators, 79% of all municipal solid waste incinerators in the United States are in Black, brown, and/or low-income communities.[38] In Florida, the percentage is much higher, since 10 out of the state's 11 incinerators (or 91%) are located in environmental justice communities, including the Covanta Incinerator at issue here.[39] And nationally, a staggering 67% to 83% of the worst-emitting incinerators (as to nitrogen oxides, sulfur dioxide, lead, mercury, particulate matter, and carbon monoxide) are in environmental justice communities.[40]

The clear environmental injustices incinerators present along with the demographics of the population around the Covanta Incinerator demonstrate the need for more stringent scrutiny of this permit, as discussed more fully in Section II, below. Approximately 84,254 people live within three miles of the Covanta Incinerator, of whom 92% are people of color and 36% live below the poverty level.[41] The area around the facility contrasts starkly with the State as a whole, where only 46% of the population is minority. Also within three miles of the Covanta Incinerator are public housing and subsidized housing funded by the U.S. Department of Housing and Urban Development that consist of 12 public housing buildings and two subsidized housing buildings.[42]

As major emitters of pollutants like fine particulate matter and NOx, waste incinerators, together with above-described socioeconomic factors, make communities of color more susceptible to respiratory infections like COVID-19.[43] We know that Black and Latinx people in the United States have been three times as likely to become infected from COVID-19 as white people.[44] Moreover, Black and Latinx people have been nearly twice as likely to die from the virus.[45] To date, Miami-Dade county has reported some of the highest coronavirus infection and death rates in the state.[46] In the midst of the COVID-19 pandemic from which we are still grappling with the unknowns of new variants, DEP should take seriously and prioritize how facilities like the Covanta Incinerator exacerbate inequitable health burdens and environmental injustices.

Grounded in a history of exclusion and discrimination, incinerators in environmental justice communities contribute to ongoing public health risks to residents. These historical and present-day considerations, when considered alongside the demographics of the environmental justice communities that surround the Covanta Incinerator, warrant reviewing this permit in

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[38] *Id*. at 4.
[39] *See* The Cost of Burning Trash at 1.
[40] Baptista & Perovich, *supra* note 8, at App. E.
[41] EJSCREEN Report at 2-3.
[42] EPA, EJSCREEN image showing public and subsidized housing for a three-mile radius surrounding the Covanta Incinerator ("EJSCREEN Public Housing") (Search performed on Dec. 9, 2021 at https://ejscreen.epa.gov/mapper) (Attachment 21)
[43] The Injustice of Incinerators at 10.
[44] Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus,* N.Y. Times, (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html (Attachment 22).
[45] *Id.*
[46] N.Y. Times, *Tracking Coronavirus in Florida: Latest Map and Case Count*, N.Y. Times (updated Dec. 15, 2021) https://www.nytimes.com/interactive/2021/us/florida-covid-cases.html (Attachment 23a at 2-5); Image of database documenting 683,842 total coronavirus cases and total 9,208 coronavirus deaths in Miami-Dade County as of Dec. 15, 2021—higher than any other county in Florida (Attachment 23b).

accordance with environmental justice principles and requirements discussed more fully in Section II, below.

C. Incinerators Accelerate the Climate Crisis

As DEP knows, Florida—and Miami-Dade County in particular—are on the frontlines of the climate crisis. With more than 1,000 miles of tidal coastline, sea-level rise, extreme heat, more intense hurricanes, and flooding, Florida has been dubbed "Ground Zero" in the climate crisis.[47] Rather than politicizing the problem through a game of semantics,[48] Florida should be doing everything in its power to protect Floridians from—and not worsen—climate change threats.

Incinerators emit more greenhouse gas emissions per unit of electricity produced than any other power source, rendering their classification as a renewable, clean source of energy false and counterproductive.[49] Though coal has been recognized as one of the dirtiest forms of energy production, incinerators emit more air pollutants than coal plants per unit of energy, 6 times more smog-forming nitrogen oxides, 5 times more carbon monoxide, and 2.5 times more greenhouse gases, among other pollutants.[50] The incentives and credits Florida provides for incinerators to operate[51] would be better invested in true clean energy solutions, such as solar energy.

Incinerators often lock municipalities into long-term contracts for up to 30 years. With the lease on the Covanta Incinerator up for renewal in October 2022, which would automatically extend the lease for up to 20 more years, this Title V permit presents an opportunity for DEP to send a clear message to Miami-Dade County and the state that public health, environmental justice, and climate change threats warrant new and different solutions for managing waste.

D. About the Miami-Dade County Resources Recovery Facility

The Public Notice for the proposed Title V permit provides the following description of the source:

> The Miami-Dade County Resources Recovery Facility consists of four municipal waste combustors (MWC) and ancillary equipment. Each unit has a maximum continuous rating of 198,000 pounds per hour of steam with a range of 584 to 782 tons/day at a heat content of 4,500 to 5,500 British thermal units per pound of refuse derived fuel (RDF) required to achieve the rating. The four units combined produce enough steam to generate approximately 77 megawatts of electricity.
>
> The facility began operation in 1982 and by 1990 had been converted to the present RDF design. Emissions from each unit are controlled by: a spray dryer absorber for acid gases

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[47] *See*, *e.g.*, Union of Concerned Scientists & reTHINK Energy Florida, *Florida: Ground Zero in the Climate Crisis*, (2019), https://www.ucsusa.org/sites/default/files/attach/2019/05/Florida-Gound-Zero-in-the-Climate-Crisis-newer.pdf.

[48] *See* David Fleshler, *DeSantis proposes plan to fight rising seas without any 'left-wing stuff,'* South Fla. Sun Sentinel (Dec. 7, 2021), https://www.sun-sentinel.com/news/environment/fl-ne-desantis-sea-level-20211207-zuwvjhrdfndtzazwvyyoqqtfkm-story.html.

[49] Tangri, *supra* note 7.

[50] The Injustice of Incinerators, *supra* note 7.

[51] *See, e.g.,* Fla. Stat. § 403.706(4)(a) (2021).

such as sulfur dioxide (SO_2) and hydrogen chloride; a fabric filter baghouse for particulate matter; a selective non-catalytic reduction system for nitrogen oxides (NO_X); and an activated carbon injection system for mercury, other metal HAPs and dioxin/furans. The facility is equipped with continuous emission monitoring systems for carbon monoxide, SO_2 and NO_X, and a continuous opacity monitoring system for visible emissions.

The biomass fuel preparation system processes up to 400,000 tons/year of the organic bulky solid waste into biomass, which is either transported off-site for use in biomass-fired cogeneration units or combusted on-site. Biomass, in the energy production industry, refers to living and recently living biological material which can be used as fuel or for industrial production.

The facility also has an ash building and ash handling system, lime storage silos and activated carbon storage silos. Units 1 and 2 share a common stack, each with its own flue. The same stack/flue configuration is used for Units 3 and 4. Odors are minimized by: keeping the truck access doors closed during non-use; maintaining a negative pressure within the garbage tipping floor building; and, using the collected air from the garbage tipping floor building as combustion air for the MWC.[52]

The source was constructed before 1995, and thus the U.S. Environmental Protection Agency (EPA) regulations allow the older source to emit higher levels of pollutants than new sources, including air toxics. EPA's regulations for municipal waste incinerators are not based on the best available technology, fail to regulate air toxics, and fail to take into account other factors such as simultaneous exposure to air toxins.

E. The Department of Environmental Protection Has a Duty to Protect Public Health and the Environment

In approving Title V air permits, DEP has a duty under state law to protect public health, safety, and welfare; prevent the creation of nuisances; and enhance the environment for the people of Florida.[53] For the reasons stated in these comments, DEP's proposed action to approve the Title V air permit disregards state law provisions and is inconsistent with its authority under its EPA-approved Title V and State Implementation Plan (SIP) Programs.

DEP, in considering this Draft Title V Permit, must harmonize its actions with Florida's solid waste management laws.[54] In enacting Florida's Solid Waste Management Act, the State Legislature found that "[i]nefficient and improper methods of managing solid waste create hazards to public health, cause pollution of air and water resources, constitute a waste of natural resources, have an adverse effect on land values, and create public nuisances."[55] As discussed in these comments, for years, this source has created hazards to public health, caused pollution of

[52] Public Notice of Intent to Issue Title V Permit, Division of Air Resource Management, Office of Permitting and Compliance, Draft Permit No. 0250348-013-AV, Miami-Dade Department of Solid Waste Management, Miami-Dade County Resources Recovery Facility, Miami-Dade County, Florida.
[53] Fla. Stat. § 403.702 (2021).
[54] *See id*. § 403.702(g).
[55] *Id*. § 403.702(1), (1)(a).

the air, created a public nuisance, and likely adversely affected land values, all contrary to State Legislature's purposes in enacting this legislation.

Moreover, the Legislature declared that the State must "regulate…[the] processing…of solid waste in order to protect the public safety, health, and welfare [and] enhance the environment for the people of this state[.]"[56] As discussed in these comments and evidenced in the attached Odor Complaint Log, the proposed permit is merely a continuation of what has been in place for many years, and the proposed permit conditions and terms fail to control odors. Thus, the draft permit neither protects public health and welfare nor does the incinerator enhance the environment for the adjacent environmental justice community. Rather, the Covanta Incinerator does the complete opposite—it makes the surrounding area an unpleasant and intolerable place to live for much of the year.

In further violation of Florida Statute, the Draft Permit allows the source to avoid many federal requirements and to continue to process its solid waste in an environmentally unacceptable manner.[57] DEP's proposed action is also contrary to state law because the air emissions from this source fail to "[p]romote the application of resource recovery systems which preserve and enhance the quality of air, water, and land resources,"[58]

Finally, the Florida Division of Administrative Hearings Recommended Order regarding the initial application for site certification of the Covanta Incinerator—after considering testimony and evidence and making findings of fact and conclusions of law— found that the Covanta Incinerator would "eliminate odors."[59] Despite concluding that the facility would have "minimal" adverse effects on human health and the environment,[60] the facility continues to cause tremendous air quality problems to those that live in its vicinity. Furthermore, the Administrative Order states it was issued in part to balance the increasing demands for electrical power with the broad interests of the public.[61] With the significant adverse impacts to the air quality of the adjacent environmental justice neighborhoods, it is false to suggest that producing electrical power at this location outweighs the public interests, particularly given the alternatives to producing electrical power.

In sum, DEP must consider the health and environmental threats this incinerator poses, outlined in the sections above, in this Title V permit renewal process.

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[56] *Id*. § 403.702(2)(a).
[57] *See id*. § 403.702(2)(a), (c).
[58] *Id*. § 403.702(2)(e).
[59] *In Re: Dade County Application for Certificate of Resource Recovery Facility under the Provisions of the Florida Electrical Power Plant Siting Act*, No. 77-607, Order at 2-3 (Fla. Div. of Admin. Hearings Nov. 22, 1977) ("Administrative Order"), available at https://www.doah.state.fl.us/ROS/1977/77000607.pdf (note: the Administrative Order's attachments, and original, unmodified conditions do not appear to be available online) (Attachment 24); *In Re: Dade County Application for Certificate of Resource Recovery Facility under the Provisions of the Florida Electrical Power Plant Siting Act*, Case No. 77-607 (The Florida Governor and Cabinet Jan. 9, 1978) ("Governor's Order"), available at http://publicfiles.dep.state.fl.us/Siting/Outgoing/Web/Dade/1978_1_9_FO_Certification.pdf (order adopting the Hearing Officer's Administrative Order, which recommended certification of the proposed site subject to certain conditions) (Attachment 25).
[60] Administrative Order at 4.
[61] *Id*. at 4.

II. DEP AND EPA MUST CONSIDER ENVIRONMENTAL JUSTICE IN THIS PERMITTING PROCESS

DEP and EPA must also assess the deficiencies in the Draft Title V Permit detailed in these comments through an environmental justice lens given the demographics of the surrounding community. Within three miles of the Covanta Incinerator, 92% of the population are people of color and 36% live below the poverty level.[62] Also within three miles of the incinerator are 12 public housing buildings and two subsidized housing buildings that are federally funded.[63]

Where the law allows the permitting authority to exercise judgment in permitting decisions, as it does here, environmental justice considerations favor the most protective permit possible. The Covanta Incinerator is a large, complex, high-polluting facility that impacts the neighborhoods surrounding it, as evidenced by the numerous unresolved complaints about it submitted to the city of Doral.[64] Environmental justice and public health factors described in Section I, above, heighten the already strong legal requirements for: (1) adequate public notice regarding the permit and its requirements; (2) meaningful, detailed statements that fully set forth the bases for permit conditions; and (3) careful, extensive emissions monitoring requirements sufficient to ensure the facility is operating within its permit limits. Furthermore, in the context of Title V operating permits, the compelling environmental justice circumstances here highlight the necessity for adequate periodic monitoring and practical enforceability to ensure that the facility will comply with all applicable emission limits.

Unless and until DEP remedies the deficiencies in the Draft Title V Permit to eliminate the risks of harm to the environmental justice communities surrounding the facility and to provide for the highest level of transparency around the facility's operations, this Title V permit renewal application should be denied.

A. DEP Must Consider Environmental Justice Under Title VI of the Civil Rights Act, and the Clean Air Act and Florida Law Otherwise Authorize DEP to Consider Environmental Justice

1. DEP Must Consider Environmental Justice under Title VI of the Civil Rights Act

DEP, as an agency that accepts federal funding, must consider environmental justice under Title VI of the Civil Rights Act of 1964, which states that "no person shall, on the ground of race, color, national origin, sex, age or disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity[.]"[65]

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[62] EJSCREEN Report at 2.
[63] EJSCREEN Public Housing
[64] *See generally* Odor Complaint Log (note: this log contains complaints submitted to the City of Doral's 311 Odor Hotline; the undersigned received three separate logs covering different date ranges in response to records requests to the City and compiled them chronologically into one log attached here; some of the complaints pertain to the Medley Landfill, an additional source of pollution and odors in Doral and surrounding areas).
[65] 42 U.S.C § 2000d.

DEP receives federal funding from EPA for its Air Program.[66] And while the Title V permit program is supported by fees from the sources that are subject to the program, the Title V permit program relies on other elements of the DEP Air Program that are funded by EPA. As a result, DEP has an obligation to ensure the fair treatment of communities that have been environmentally impacted by sources of pollution. Environmental justice also requires the fair treatment of these communities in the development and implementation of agency programs and activities, including those related to the Title V permit and the applicable requirements it includes.

The fact that there is public and subsidized housing funded by the U.S. Department of Housing and Urban Development (HUD) within three miles of the Covanta Incinerator further implicates Title VI.[67] This proximity between the incinerator and federally funded housing raises the concern that low-income families of color assisted by HUD will face disproportionate environmental burdens and health risks caused by the incinerator.

DEP's Draft Title V Permit package contains no information whatsoever that it took environmental justice issues and considerations into account or that it consulted with HUD. DEP must conduct a thorough analysis of the current and potential effects to impacted communities from the facility. By omitting this analysis, DEP is not fulfilling its obligations under the law.

Lastly, the state is violating Title VI by not using its Title V review authority to improve transparency regarding pollutants emitted by the facility, ensure the permit terms and conditions are practically enforceable, and require adequate monitoring of emissions.

Consistent with legal requirements, DEP must take into consideration impacts to the environmental justice communities in developing and issuing this permit.

2. Title V of the Clean Air Act Provides Authority to Consider Environmental Justice Concerns

DEP has authority under the Title V program to consider and address environmental justice concerns. EPA has explained that environmental justice issues can be raised and considered in the context of a variety of actions carried out under the CAA, and Title V can help promote environmental justice through its underlying public participation requirements and through the requirements for monitoring, compliance certification, reporting, and other measures intended to assure compliance with applicable requirements.

Under Administrator Michael Regan, EPA has made clear that environmental justice is a top priority[68] and to that end, has considered environmental justice issues when issuing orders in Title V matters. DEP must also consider environmental justice and similarly respond. For example, on May 14, 2021, EPA issued a temporary order to halt operations at the Limetree Bay

[66] *See, e.g.,* State of Florida, Air Pollution Control Trust Fund Audit, 3 (2021), http://floridafiscalportal.state.fl.us/Document.aspx?ID=21738&DocType=PDF.
[67] EJSCREEN Public Housing; *See* EPA's Letter to U.S. Dept. of Housing and Urban Development (HUD) Re: Ajax Asphalt Plant draft Permit to Install (Sept. 16, 2021) (Attachment 26); HUD, Comment Letter to EPA Re: Ajax Asphalt Plant, Flint, Michigan (Sept. 22, 2021) (Attachment 27).
[68] EPA News Release, citing "Administrator Michael Regan, Remarks for White House Environmental Justice Advisory Council (WHEJAC) First Public Meeting, As Prepared for Delivery," https://www.epa.gov/speeches/administrator-michael-regan-remarks-white-house-environmental-justice-advisory-council (March 30, 2021) (Attachment 28).

refinery in the U.S. Virgin Islands after four instances of excess emissions impacting an "overburdened community."[69] In issuing the order, EPA explained that under its legal authorities in Clean Air Act Section 303, EPA may take this urgent measure when an entity's actions are substantially endangering public health, welfare, or the environment. Subsequent to EPA's order, the refinery ceased operation. Then, on July 13, 2021, the U.S. Department of Justice (DOJ) claimed in federal complaint that the refinery "presents an imminent and substantial danger to public health and the environment."[70]

As another example, on October 22, 2021, the Oregon Department of Environmental Quality signed an agreement with Owens-Brockway to pay a penalty for polluting, which included spending a portion of the penalty on a project to improve air quality in the surrounding community and either install pollution controls or cease to operate under its Title V Permit.[71]

Lastly, Alabama's Jefferson County Department of Health denied renewal of the Title V Permit for the Bluestone Coke plant due to continued violations for more than ten years.[72] The County also filed a complaint that "[r]esidents of predominantly Black neighborhoods near the plant… have been exposed to high-levels of toxic and visible air pollution and noxious odors for

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[69] EPA News Release, "EPA Uses Emergency Powers to Protect St. Croix Communities and Orders Limetree Bay Refinery to Pause Operations," (May 14, 2021), https://www.epa.gov/newsreleases/epa-uses-emergency-powers-protect-st-croix-communities-and-orders-limetree-bay-refinery#:~:text=NEW%20YORK%20%E2%80%93%20The%20U.S.%20Environmental%20Protection%20Agency,that%20present%20an%20imminent%20risk%20to%20public%20health ("EPA News Release") (Attachment 29); Clean Air Act Emergency Order, *In the matter of Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC*, No. CAA-02-2021-1003, (EPA Region 2 May 14, 2021), https://www.epa.gov/sites/default/files/2021-05/documents/limetree_bay_303_order_-_caa-02-2021-1003.pdf (Attachment 30); *see generally*, EPA, "Limetree Bay Terminals and Limetree Bay Refining, LLC," https://www.epa.gov/vi/limetree-bay-terminals-and-limetree-bay-refining-llc (last visited Dec. 19, 2021).

[70] U.S. DOJ Press Release, "United States Files Complaint and Reaches Agreement on Stipulation with Limetree Bay Terminals LLC and Limetree Bay Refining LLC Relating to Petroleum Refinery in St. Croix, U.S. Virgin Islands," (July 12, 2021) https://www.justice.gov/opa/pr/united-states-files-complaint-and-reaches-agreement-stipulation-limetree-bay-terminals-llc (Attachment 31); Joint Stipulation, *U.S. v. Limetree Bay Refining, LLC et al*., Civ. A. No. 1:21-cv-00264 (D.V.I. July 12, 2021) https://www.justice.gov/opa/press-release/file/1411236/download (Attachment 32); Letter from Dore LaPosta, Director, Enforcement and Compliance Assurance Division, EPA Region 2, to Jeffrey Hersperger, Senior Vice President, Limetree Bay Terminals, LLC, "Request to Provide Information Pursuant to the Clean Air Act, Reference Number: CAA-02-2021-1462," (July 12, 2021), https://www.epa.gov/system/files/documents/2021-07/stipulation-ex.-2.pdf (Attachment 33).

[71] State of Oregon Press Release, "DEQ enforcement finds Owens-Brockway $1 mllion and requires facility to control pollution," (June 3, 2021) https://www.oregon.gov/newsroom/pages/NewsDetail.aspx?newsid=63325 (Attachment 34); Mutual Agreement and Final Order, *In the Matter of Owens-Brockway Glass Container Inc*., No. AQ/V-NWR-2020-208, (Ore. Envtl. Quality Comm'n. Oct. 22, 2021), https://www.oregon.gov/deq/Programs/Documents/OwensBrockway2020-208MAO.pdf (Attachment 35); *see generally*, Oregon Department of Environmental Quality, "Supplemental Environmental Projects," https://ordeq.org/sep (last visited Dec. 19, 2021) (Attachment 36).

[72] Letter from Jonathan Stanton, Director, Environmental Health Services, Jefferson County Department of Health, to Tiger Lambert and Freddie Revis, *et al*, Bluestone Coke, denying Operating Permit for Bluestone Coke, LLC (Aug. 11, 2011) (Attachment 37); Complaint, *Jefferson Cty Bd. of Health v. Bluestone Coke, LLC*, No. 01-CV-2021902311.00 (Jefferson Cty, Ala. Aug. 11, 2021) (Attachment 38); *see also*, CBS42 News, *Bluestone Coke allowed to continue operating despite strong objection from JCDH*, (Sept. 2, 2021) https://www.cbs42.com/your-voice-your-station/bluestone-coke-allowed-to-continue-operating-despite-strong-objection-from-jcdh/.

years," noting a history of heart, lung, and neurological health problems and cancer of residents in the community. [73] The source recently reportedly ceased all operations at its facility.[74]

3. Florida Law Provides DEP With Authority and Resources to Consider Environmental Justice in Title V Permit Actions

DEP has authority and resources available to support environmental justice concerns under State law. The Florida State Legislature established the Florida Environmental Equity and Justice Commission (Florida Law, CH. 94-219) in 1994. The Commission was directed to conduct a study to determine if low-income and minority communities are more at risk from environmental hazards than the general population. It subsequently published a report concluding specific communities, in particular lower-income communities of color, were disproportionately impacted by environmental hazards throughout the State and recommended that a center for environmental equity and justice be permanently established.[75]

In 1998, the Legislature formally created the Community Environmental Health Program and established the Center of Environmental Equity and Justice (CEEJ) (Florida Law, CH. 98-304) at Florida Agricultural and Mechanical University (FAMU).[76] The mission of the CEEJ is to address environmental issues through research, education, training, and community outreach, and make recommendations to be used in developing policies that are designed to protect all citizens from exposure to environmental hazards.

Since the founding of the CEEJ in 1998, there have been no other legislative or Florida agency actions substantively addressing environmental justice and equity concerns. The notice of a recent move to Interim Secretary by a previous holder of the DEP environmental justice coordinator position may be the first notice given to the public that such a position ever even existed.[77] CEEJ is tasked with assisting DEP, and DEP otherwise has authority under State law to work with other agencies to evaluate environmental justice and equity issues.[78] DEP may:

- Examine issues relating to enforcement, evaluation, health effects and risks, and site placement;
- Provide and facilitate education and training on environmental equity and justice issues to students, citizens, and local and state government employees through traditional media networks;
- Develop research programs to elucidate and validate contaminant biomarkers of exposure, effect and susceptibility; in human populations;

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[73] Southern Environmental Law Center Press Release, "Bluestone Coke shuts down, providing relief for surrounding communities," (Dec, 7, 2021), https://www.southernenvironment.org/news/bluestone-coke-shuts-down-providing-relief-for-surrounding-communities/ (Attachment 39).
[74] *Id.*
[75] Richard Gragg et al., *The Location and Community Demographics of Targeted Environmental Hazardous Sites in Florida*, 12 Fla. State Univ. J. Land Use & Envtl. Law: Vol. 1 (1996), https://ir.law.fsu.edu/jluel/vol12/iss1/1 (Attachment 40).
[76] Chapter 98-304, Committee Substitute for House Bill 945 https://www.flsenate.gov/Session/Bill/1998/945/BillText/er/PDF (Attachment 41).
[77] FL DEP, Office of the Secretary, Shawn Hamilton, Interim Secretary, https://floridadep.gov/sec (Attachment 42).
[78] Fla. Stat. § 403.061(3) (2021) (DEP may "[u]tilize the facilities and personnel of other state agencies, including the Department of Health, and delegate to any such agency any duties and functions as the department may deem necessary to carry out the purposes of this act.")

- Assess environmental impacts on populations using geographical information systems and other technologies for developing strategies;
- Focus on the sampling and analysis of environmental contaminants in impacted communities;
- Serve as a statewide environmental justice technical and public information resource.[79]

Based on the foregoing mandates and policy considerations, the promotion of environmental justice is central and critical to DEP's determination of this Title V permit renewal application.

B. EPA Must Consider Environmental Justice and Has a Repository of Material Available for Considering Environmental Justice

When EPA reviews a Draft Title V Permit and should EPA receive a petition requesting that it object to the State's issuance of a proposed Title V permit, it is free to reconsider any aspect of that State's analysis. In doing so, Executive Orders from 1994 and 2021 require that EPA, as a federal agency, integrates environmental justice principles into its decision-making:

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," from 1994 requires federal executive agencies such as EPA to:

> [M]ake 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"[80]

Moreover, on January 27, 2021, the Biden Administration signed "Executive Order on Tackling the Climate Crisis at Home and Abroad."[81] The new Executive Order on climate change and environmental justice amended the 1994 Order and provides that:

> It is the policy of [this] Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy; *... protects public health ... delivers environmental justice ...*[and that] … [s]uccessfully meeting these challenges will require the Federal Government to pursue such a coordinated approach from planning to implementation, coupled with substantive engagement by stakeholders, including State, local, and Tribal governments.[82]

EPA has a lead role in coordinating these efforts, and recently, EPA Administrator Regan directed all EPA offices to clearly integrate environmental justice considerations into their plans

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[79] National Academy of Public Administration, *Models for Change: Efforts by Four States to Address Environmental Justice*, 55-56 (2002), https://www.epa.gov/sites/default/files/2015-02/documents/napa-epa-model-4-states.pdf (report prepared specifically for the EPA).
[80] Exec. Order No. 12898, § 1-101, 59 Fed. Reg. 7629 (Feb. 16, 1994), as amended by Exec. Order No. 12948, 60 Fed. Reg. 6381 (Feb. 1, 1995).
[81] Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021) ("Executive Order on Tackling the Climate Crisis at Home and Abroad").
[82] *Id.* at § 201 (emphasis added).

and actions.[83] Consequently, EPA has an obligation to integrate environmental justice principles into its decision-making.

EPA has also pointed to its guidance for National Environmental Policy Act (NEPA) assessments that states could rely upon for guidance in interpreting how to consider collateral impacts to environmental justice communities.[84] A collection of EPA policies and guidance related to NEPA is available at https://www.epa.gov/nepa/national-environmental-policy-act-policies-and-guidance, with one such policy specifically concerning environmental justice.[85]

In addition to the NEPA guidance materials referenced above, EPA provides a wealth of additional materials and resources for considering environmental justice,[86] such as its EJSCREEN tool, an important tool to assessing where different population groups and demographics are most vulnerable or likely to be exposed to different types of pollution. EJSCREEN uses standard and nationally consistent data to highlight places that may have higher environmental burdens and vulnerable populations.[87]

DEP should facilitate EPA's compliance with these Executive Orders by considering environmental justice in its issuance of Clean Air Act permits, including this Title V permit. Under the Clean Air Act, states are permitted to include measures that are authorized by state law but go beyond the minimum requirements of federal law.[88] Moreover, the state can also consider environmental justice when developing its permits, regardless of whether the Clean Air Act requires such consideration.

III. THE DRAFT PERMIT FAILS TO INCLUDE APPLICABLE REQUIREMENTS FROM THE STATE IMPLEMENTATION PLAN CONSTRUCTION PERMITS

A Title V permit must include all applicable requirements.[89] The term "applicable requirement," as defined in 40 C.F.R. § 70.2, includes "[a]ny term or condition of any

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[83] *See* EPA News Release, "EPA Administrator Announces Agency Actions to Advance Environmental Justice: Administrator Regan Directs Agency to Take Steps to Better Serve Historically Marginalized Communities" (April 7, 2021), https://www.epa.gov/newsreleases/epa-administrator-announces-agency-actions-advance-environmental-justice (Attachment 43).

[84] EPA, *Guidance on Regional Haze State Implementation Plans for the Second Implementation Period*, 33 (2019) ("When there are significant potential non-air environmental impacts, characterizing those impacts will usually be very source- and place-specific. Other EPA guidance intended for use in environmental impact assessments under the National Environmental Policy Act may be informative, but not obligatory to follow, in this task.") (Attachment 44).

[85] *See* EPA, "Environmental Justice Guidance for National Environmental Policy Act Reviews," https://www.epa.gov/nepa/environmental-justice-guidance-national-environmental-policy-act-reviews (last visited Dec. 19, 2021).

[86] *See* EPA, "Learn About Environmental Justice," https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last visited Dec. 19, 2021) (Attachment 45).

[87] *See* EPA, "EJSCREEN: Environmental Justice Screening and Mapping Tool," https://www.epa.gov/ejscreen/additional-resources-and-tools-related-ejscreen (last visited Dec. 19, 2021).

[88] *See, e.g., Union Elec. Co v. U.S. Envtl. Prot. Agency*, 427 U.S. 246, 265 (1976); *Ariz. Pub. Serv. Co. v. U.S. Envtl. Prot. Agency*, 562 F.3d 1116, 1126 (10th Cir. 2009); *BCCA Appeal Group v. U.S. Envtl. Prot. Agency*, 355 F.3d 817, 826 n. 6 (5th Cir. 2003). Indeed, Florida has authority to be more stringent. *See* Fla. Stat. § 403.804.

[89] See 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 70.5(c)(4) and 70.6(a)(l), (2); see also Letter from John Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO at Enclosure A (May 20, 1999), https://www.epa.gov/sites/default/files/2015-08/documents/hodan7.pdf ("Seitz 1999 Memo") (Attachment 46).

preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act." Additionally, 40 C.F.R. § 70.5(a)(2) states that a complete application must contain information "sufficient to .. . determine all applicable requirements." Lastly, 40 C.F.R. § 70.5(c) states that "[a]n application may not omit information needed to determine the applicability of, or to impose, any applicable requirement[.]"

A. DEP Did Not Make All the Historical Construction Permits Available in Its Main Electronic File for this Source, Preventing the Public from Identifying All the Applicable Requirements

EPA has recognized in numerous prior orders that "the unavailability during the public comment period of information needed to determine the applicability of or to impose an applicable requirement also may result in a deficiency in the permit's content."[90] The previously issued air construction permits and plant history for Covanta are summarized in Table 2 below. As seen in Table 2, the Department issued air construction permits (SC 13-2690 and 2691) for the four original pulp fuel boilers on August 4, 1977 (revised September 20, 1977), and these permits are not available to the public for review in the Department's electronic file for this source.[91]

The Department also issued Permit No. PSD-FL-006F, which is also not available to the public. While the 1977 construction permit, Permit No. PSD-FL-006F, and Site Certification records are not available in the main electronic file for this source, through considerable searching efforts, commenters were able to find some of them elsewhere, as identified in the footnotes to the below table. Additionally, the record indicates that the facility underwent significant modifications between 1987 and 1990; and one would expect there to be corresponding construction permits.

Furthermore, commenters were unable to locate the complete set of Site Certification No. PA77-08 records issued by Florida's Siting Board. For example, the attachments to the Siting Order, including the original Order, unmodified conditions, and other relevant documents are missing from the electronic file.[92] Thus, the public has no way to evaluate whether there are terms and conditions from construction permits and the Siting Order records that DEP failed to include in the Draft Title V Permit. DEP must make all supporting records available to the public and include provisions from both the apparent missing permit records and the provisions from the Siting Order documents must be included in the Title V Permit.

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[90] *In the matter of U.S. Department of Energy – Hanford Operations, Benton County, Washington*, Order on Petition No. X-2016-13 (Oct. 15, 2018), at 11 (quoting *In re Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 (June 22, 2012), at 9). *See also In re Louisiana Pacific Corporation*, Order on Petition No. V-2006-3 (Nov. 5, 2007), at 14; *In re WE Energies Oak Creek Power Plant*, Order on Petition (June 12, 2009) at 24-27 (unavailability of plans); *In re Alliant Energy-WPL Edgewater Generating Station*, Order on Petition No. V-2009-02 (Aug. 17, 2010) at 12.

[91] FL DEP Technical Evaluation and Preliminary Determination, Project No. 0250348-011-AC (PSD-FL-006G) Application for Minor Source Air Construction Permit Updated Air Construction Permit (Feb. 2012), at 5. ("FL DEP 2012 Technical Evaluation") (Attachment 47).

[92] *See* Administrative Order and Governor's Order, Note 59, *supra*.

Table 2. Permitting History and Construction Permits

Action	Date(s)	Publicly available in DEP's Online File
The Department issued air construction permits (SC 13-2690 and 2691) for the four original pulp fuel boilers.[93]	Aug. 4, 1977 (revised Sept. 20, 1977)	Not available to the public in the Department's electronic source file.[94]
Site Certification No. PA77-08 was issued by the Siting Board (Governor and Cabinet) and authorized a 3,000 tons/day resource recovery facility.[95]	Jan. 9, 1978	Not available to the public in the Department's source file, and only a portion of these records were found.[96]
EPA issued Permit No. PSD-FL-006.	Feb. 27, 1978	Yes
The facility began commercial operation in 1982. There is an extensive record indicating that the original process of hydropulping, together with the method of burning and air pollution control, was a failure. The County embarked on a Capital Improvement Plan between 1987 and 1990 that effectively completed a change to RDF processing, rebuilt the four boilers and made improvements in the air pollution control equipment.[97]		Not available to the public in the Department's electronic source file.
The Department issued Permit No. PSD-FL-006A	Dec. 16, 1994	Yes
The Department issued Permit No. PSD-FL-006B	March 22, 1999	Yes
The Department issued Permit No. PSD-FL-006C	Dec. 8, 1999	Yes
The Department issued Permit No. PSD-FL-006D	July 21, 2000	Yes
The Department issued Permit No. PSD-FL-006E	March 27, 2007	Yes
The Department issued Permit No. PSD-FL-006F	2007	Not available to the public in the Department's source file.[98]
The Department issued Permit No. PSD-FL-006G	April 27, 2012	Yes

[93] FL DEP 2012 Technical Evaluation at 5.
[94] Although this permit was not found in the central file for this source, commenters located the permit elsewhere. The August 4, 1977 (revised September 20, 1977) air construction permits are available starting at page 305 of this document: https://depedms.dep.state.fl.us:443/Oculus/servlet/shell?command=getEntity&[guid=75.59781.1]&[profile=Permitting_Authorization] (with the original permit starting at page 310).
[95] FL DEP 2012 Technical Evaluation at 5.
[96] *See* Administrative Order and Governor's Order, Note 59, *supra*. .
[97] FL DEP 2012 Technical Evaluation at 5.
[98] The 2007 PSD Permit is available elsewhere, https://depedms.dep.state.fl.us:443/Oculus/servlet/shell?command=getEntity&[guid=75.26234.1]&[profile=Permitting_Authorization.

B. The Draft Title V Permit Fails to Include Emission Limitations from the State Implementation Plan Permits

The Title V definition of applicable requirements "unambiguously refers to all requirements in a state's implementation plan [SIP],"[99] as well as conditions in permits issued under SIP-approved programs, such as the prevention of significant deterioration (PSD) program. SIP-approved permits do not expire and are not superseded by Title V permits. Indeed, "the continuing existence of SIP-approved permits independent of Title V preserves the ability of permitting authorities and EPA to reopen Title V permits that failed to include all SIP-approved permit terms, or to make such corrections upon permit renewal"[100] If a state does not want a SIP provision or SIP-approved permit condition to be listed on the Federal side of a Title V permit, it must take appropriate steps in accordance with the substantive and procedural requirements of CAA Title I to delete those conditions from its SIP or SIP-approved permit.[101] If a state fails to take appropriate steps in deleting a SIP provision or condition in a SIP-approved permit, and it is not carried over to the Title V permit, then the Title V permit would be subject to an objection by EPA.[102]

Here, DEP failed to take appropriate steps when it deleted numerous conditions from SIP-approved permits for the Covanta facility and erroneously modified SIP-approved PSD permit requirements in numerous ways. First, it removed the emission limitations for VOCs, fluoride, sulfuric acid mist and arsenic from PSD Permit No. PSD-FL-006A. Second, a DEP PSD permit action relaxed the emission limitation for lead and removed other requirements from the PSD permit.[103] As explained below, in removing these applicable requirements from the PSD permit, DEP erroneously modified Permit No. PSD-FL-006A. Because DEP's modifications of the PSD permit were not in accordance with CAA substantive and procedural requirements, the erroneously deleted and modified PSD permit requirements are in fact "applicable requirements" for the purposes of Title V and must be included in the Draft Title V Permit.

As its justification, DEP's Technical Evaluation stated that the revisions would (1) delete from the PSD permit the emission standards and testing requirements for pollutants emitted at very low levels, that are classified as HAPs, and are not regulated by the PSD rules; and (2) delete emission standards and testing requirements for each PSD pollutant demonstrated to have been emitted at rates much less than the respective applicable significant emission rate and emission standard established in the earlier permits.[104]

However, there are significant issues with DEP's PSD permit revisions and purported justifications. First, the environmental justice community's expectation is that DEP will use its authority to ensure transparency and full public disclosure of emissions from the facility. DEP's decision to remove emission limitations and monitoring requirements and to relax emission standards ignores the compelling needs of the environmental justice community. Second, low

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[99] *Sierra Club v. U.S. Envtl. Prot. Agency*, 964 F.3d 882, 891 (10th Cir. 2020).
[100] Seitz 1999 Memo, Enclosure A at 5.
[101] *Id.*, Enclosure A at 1.
[102] *Id.*
[103] FL DEP Air Permit No. 0250348-011-AC (PSD-FL-006G) (April 27, 2012), Emission Standards at 10. (Attachment 48).
[104] FL DEP 2012 Technical Evaluation at 7.

emission rates are not a justification for removing emission limitations and monitoring requirements, particularly given the variability of waste burned by the incinerator. Third, a state may include provisions in permits that are more stringent and different than federal requirements. Finally, a permit applicant may also request and a state may include provisions that are additional to and more protective than federal requirements.

The several more specific issues regarding DEP's PSD permit revisions and deletions are discussed below as follows:

1. VOC Emission Limitations

For VOC emissions, SIP-approved Permit No. PSD-FL-006A requires:[105]

(VOC)	Volatile Organic Compound (Hydrocarbons) emissions shall not exceed 25 ppmvd, corrected to 7 percent O_2 (dry basis); 0.0145 lb/MMBtu, 4.37 lbs/hr per unit and 19.1 tons/yr per unit. Due to DCRRF's location in a non-attainment area for ozone, the permittee must furnish to the Department evidence (i.e. test results) that this facility emits less than 100 tons per year of hydrocarbons, or must obtain legally enforceable limits for the hydrocarbon emissions from this facility.

DEP, in its 2012 action for permit PSD-FL-006G, explained that "[t]his standard will be removed as the four [municipal waste combustors (MWC)] emit much less than the [significant emission rate (SER)] for this pollutant. The CO limit is a sufficient surrogate for VOC for this facility. The facility has been consistently demonstrated to emit less than 100 tons/year of VOC. The area is no longer non-attainment."[106]

However, what DEP characterizes as low emission levels are not a justification to remove the emission limitation, particularly given the variability of waste incinerated at this facility. The VOC standard falls within the definition of an applicable requirement, as it is a term from a SIP-approved permit, PSD-FL-006A, and DEP's erroneous removal of it in a subsequent permit action cannot change this. Furthermore, DEP's 2012 PSD permit action failed to provide any basis for using CO as a surrogate for VOC. Moreover, that an area is no longer designated non-attainment does not mean that permitting limitations and requirements no longer apply. EPA's redesignation to attainment does not supersede previously issued SIP-approved permits.[107]

2. Fluoride Emission Limitations

For fluoride emissions, SIP-approved Permit No. PSD-FL-006A requires:[108]

[105] FL DEP Air Permit No. PSD-FL-006A (Dec. 16, 1994) at 7 ("FL DEP 1994 PSD Permit"), *available at* https://arm-permit2k.dep.state.fl.us/psd/0250348/0000F612.pdf (Attachment 49).
[106] FL DEP 2012 Technical Evaluation 14.
[107] *See* 42 U.S.C. § 7407(d)(3)(E) (conditions for redesignation).
[108] FL DEP 1994 PSD Permit at 7.

(F)	Fluoride emissions shall not exceed 840 ug/m_3 corrected to 7 percent O_2 (dry basis), $7.3x10^{-4}$ lb/MMBtu, 0.22 lb/hr per unit and 0.97 ton/year per unit.

DEP's 2012 PSD permit action explained: "[t]his standard will be removed as the facility reports 0.3 tons/year of fluoride compared with SER of 3 tons/year and ~ 0.1 tons/year/unit. PM and acid gas control are sufficient to control fluoride"[109]

Again, what DEP characterizes as low emission levels are not a justification to remove the emission limitation, given the variability of waste incinerated at this facility. The fluoride standard falls within the definition of an applicable requirement, as it is a term from a SIP-approved permit, PSD-FL-006A, and DEP's erroneous removal of it in a subsequent permit action cannot change this requirement. Moreover, DEP's 2012 PSD permit action failed to provide any basis for using particulate matter (PM) and acid gas control to control fluoride.

3. Sulfuric Acid Mist

For sulfuric acid mist emissions, SIP-approved Permit No. PSD-FL-006A requires:[110]

(H_2SO_4)	Sulfuric Acid Mist emissions shall not exceed 2.1 ppmvd corrected to 7 percent O_2 (dry basis), 0.007 lb/MMBtu, 2.20 lbs/hr per unit and 9.8 tons/year per unit.

DEP's 2012 PSD permit action explained: "[t]he facility reports approximately 1.7 tons/year/unit. The concentration limit was not set pursuant to PSD/BACT[Best Available Control Technology (BACT)]. The MWC rule limits for SO_2 and HCl are adequate surrogates for all acid gases from this facility. The SAM [sulfuric acid mist] limits will be removed."[111]

DEP's PSD permit action failed to provide any basis for using SO_2 and HCl as surrogates for sulfuric acid mist. The sulfuric acid mist standard falls within the definition of an applicable requirement, as it is a term from a SIP-approved permit, PSD-FL-006A, and DEP's erroneous removal of it in a subsequent permit action cannot change this requirement. Moreover, DEP has authority to include more stringent limits in its permits—and should do so—given the impacted environmental justice community.

4. Arsenic

For arsenic emissions, SIP-approved Permit No. PSD-FL-006A requires:[112]

(As)	Arsenic emissions shall not exceed 9.3 ug/m_3 corrected to 7 percent O_2 (dry basis); $8.1x10^{-6}$ lb/MMBtu, 0.0024 lb/hr per unit and 0.011 ton/yr per unit.

[109] FL DEP 2012 Technical Evaluation at 14.
[110] FL DEP 1994 PSD Permit at 7.
[111] FL DEP 2012 Technical Evaluation at 13.
[112] FL DEP 1994 PSD Permit at 8.

DEP's 2012 PSD permit action explained: "[p]er 1990 CAA Amendments, arsenic is no longer a PSD pollutant and is regulated by programs for HAP. The MWC rule regulates arsenic through the regulation of MWC metals as PM. Thus arsenic will be removed."[113]

DEP's PSD permitting action did not provide a correlation between arsenic and PM. The arsenic standard falls within the definition of an applicable requirement, as it is a term from a SIP-approved permit, PSD-FL-006A, and DEP's erroneous removal of it in a subsequent permit action cannot change this requirement. Moreover, DEP has authority to include more stringent limits in its permits—and should do so—given the impacted environmental justice community.

5. Lead

For lead emissions, SIP-approved Permit No. PSD-FL-006A requires:[114]

(Pb)	Lead emissions shall not exceed 380 ug/m_3 corrected to 7 percent O_2 (dry basis), $3.3x10^{-4}$ lb/MMBtu, 0.10 lb/hr per unit and 0.44 ton/year per unit.

DEP's 2012 PSD permit action explained: "[t]he lead (Pb) standard will be removed from Permit PSD-FL-006D as the four MWC units emit much less Pb than the SER for this pollutant. The slightly less stringent Pb limit from the present MWC rule will be included in the Title V operation permit."[115]

The lead standard falls within the definition of an applicable requirement, as it is a term from a SIP-approved permit, PSD-FL-006A, and DEP's erroneous removal of it in a subsequent permit action cannot change this requirement. Furthermore, the removal cannot be justified as streamlining permit conditions; under streamlining, the permitting authority retains the most stringent requirement. Additionally, DEP should not have relaxed the emission limitation for lead given the nearby environmental justice community.

6. Beryllium

For beryllium emissions, SIP-approved Permit No. PSD-FL-006A requires:[116]

(Be)	Beryllium emissions shall not exceed 0.46 ug/m_3 corrected to 7 percent O_2 (dry basis); $4.0x10^{-7}$ lb/MMBtu, 0.00012 lb/hr per unit and 0.0005 ton/yr per unit.

DEP's 2012 PSD permit action explained: "[p]er 1990 CAA Amendments, beryllium is no longer a PSD pollutant and is regulated by programs for HAP. The MWC rule regulates beryllium through the regulation of MWC metals as PM. Thus, beryllium will be removed."[117]

It was inappropriate for DEP to remove the emission limitation for beryllium given the nearby environmental justice community. DEP also failed to provide a basis for suggesting the

[113] FL DEP 2012 Technical Evaluation at 14.
[114] FL DEP 1994 PSD Permit at 7.
[115] FL DEP 2012 Technical Evaluation at 14.
[116] FL DEP 1994 PSD Permit at 8.
[117] FL DEP 2012 Technical Evaluation at 14.

correlation between beryllium and lead allows removal of beryllium from the permit. And the beryllium standard falls within the definition of an applicable requirement, as it is a term from a SIP-approved permit, PSD-FL-006A, and DEP's erroneous removal of it in a subsequent permit action cannot change this requirement.

7. Nitrogen Oxide (NO_X)

For NO_X emissions, SIP-approved Permit No. PSD-FL-006A requires:[118]

> (NO_X) Nitrogen Oxide emissions shall not exceed 280 ppmvd corrected to 7 percent O_2 (dry basis); 0.5 lb/MMBtu, 140.4 lbs/hr per unit, 24-hour daily arithmetic average; and, 614.9 tons/year per unit.

DEP's 2012 PSD permit action explained: "[t]he annual limit will be removed as the units typically emit about half of the indicated value."[119]

The fact that historical actual emissions are less than an established PSD annual limit is not a basis to remove the limit from the PSD permit. Removing the limit means there is no longer a total cap on NO_X emissions at the facility and that emissions are unregulated and are permitted to increase. The NOx standard falls within the definition of an applicable requirement, as it is a term from a SIP-approved permit, PSD-FL-006A, and DEP's erroneous removal of it in a subsequent permit action cannot change this requirement.

Additionally, DEP's suggestion that operator actions will result in more frequent testing is misplaced[120]—there are no practically enforceable permit conditions in the PSD permit that were transferred to the Title V Permit that require more frequent testing and DEP provides no evidence of such.

8. When the Source is Performing Inadequately, the Owner Shall Discontinue Use Until Corrected

The initial SIP construction permit issued for the source required the following:[121]

> (X) 7. Any time this unit is found to be performing inadequately because of overloading, neglect, or other reasons, the owner shall discontinue its use until measures are provided to correct the cause of such performance.

This permit condition requires that the owner discontinue operation of the source if it is "performing inadequately." The condition further requires that the source must remain shut

[118] FL DEP 1994 PSD Permit at 6.
[119] FL DEP 2012 Technical Evaluation at 13.
[120] FL DEP 2012 Technical Evaluation at 11. ("Assuming that the new peak flow limitation would actually encourage the operator to test at higher levels in order to continuously operate at even higher levels up to 198,000 lb/hour would represent a few percent and theoretically no more than 10% annual increase in steam production.")
[121] FL Department of Environmental Regulation (DER) Air Construction Permit No. SC 13-2691 (Aug. 4, 1977, revised Sept. 20, 1977), *available at* https://depedms.dep.state.fl.us:443/Oculus/servlet/shell?command=getEntity&[guid=75.59781.1]&[profile=Permitting_Authorization] at 312 (Attachment 50).

down until measures are implemented to correct the inadequate performance. This condition was unlawfully excluded from the Draft Title V Permit and DEP must include it.

Moreover, while commenters assert the Title V permit must be denied, in the alternative, if DEP decides to issue the permit, it must make clear that this provision clearly applies to either the owner/operator inspections and/or odor complaint conditions, as the source is performing inadequately in releasing air emissions offsite to the adjacent impacted community and must be shut down. By excluding this provision from the Title V Permit, DEP has eliminated the "root cause" analysis and correction, which is necessary to assure that any and all inadequate performance issues be addressed in a satisfactory manner.

Without this provision, the Covanta Incinerator has been allowed to escape compliance by not resolving the odor and other issues described in these comments, allowing the facility to escape federally-enforceable requirements. The lack of this provision has meant that the source has never resolved offsite air emissions, instead, it subjects the thousands of the adjacent environmental justice community members to intolerable air quality with unknown pollutants.

In sum, DEP must add all the foregoing emission limits and other deleted requirements from the initial SIP permit and from PSD permits to the Title V Permit—all of which the applicant erroneously excluded from the permit application, contrary to 40 C.F.R. § 70.5(a)(2) and 40 C.F.R. § 70.5(c). Furthermore, the Title V Permit must include monitoring that is sufficient to assure that the facility operates within these limits.

C. The Draft Title V Permit Fails to Include Applicable Requirements from the PSD Permit for Control of Fugitive Emissions

The Draft Title V Permit fails to include the work practice standards for fugitive emissions found in the PSD permit. Commenters can find no explanation in the construction permit record where DEP provides a basis for removing one of these requirements. Therefore, the following requirement from the 1994 PSD permit must be included as federally enforceable permit terms and conditions in the Title V Permit: "Fugitive (unconfined) emissions at this facility shall be adequately controlled at all times."[122] This condition has not been met by the permit applicant as demonstrated by the complaints regarding offsite particulate accumulating on the property of the neighboring environmental justice community.[123] DEP must address these noncompliance issues and also include monitoring, recordkeeping, and reporting for this requirement to assure that *all* fugitive emissions are controlled.

IV. THE DRAFT PERMIT DOES NOT PROPERLY RESTRICT EMISSIONS DURING STARTUP, SHUTDOWN, AND MALFUNCTION

Facilities can emit significant amounts of harmful pollutants during periods of startup, shutdown, and malfunction (SSM). As these facilities, such as the Covanta Incinerator, are often close to environmental justice communities, SSM emissions can have significant and adverse impacts on those communities. These emissions should be regulated to the full extent possible and in no case should be exempt from requirements. While courts routinely find SSM exemptions to be impermissible, sadly EPA routinely includes them in its rules. And that is the

[122] FL DEP 1994 PSD Permit at 14.
[123] *See* Odor Complaint Log at 136-37, Complaints ODOR-57, -58, -60, -63, -71, -81, -82, -83, -84, -96, -108.

case here: EPA's rules for facilities such as Covanta include illegal SSM exemptions. While EPA must remove such exemptions from its rules, the immediate issue here is that the Draft Permit not only adopts the impermissible SSM exemptions in EPA's rules, it also expands their scope. This it cannot do.

A. Florida's Approved State Plan for Large Municipal Waste Combustors

Section 129 of the Act directs EPA to issue new source performance standards (NSPS) for new solid waste incinerators and emission guidelines for existing solid waste incinerators.[124] EPA's emission guidelines for large municipal waste combustors (MWC)[125] address incinerators such as the Covanta Incinerator that:

- Burn municipal solid waste ("MSW") as defined by the emission guidelines;
- Can combust more than 250 tons per day of MSW; and
- Commenced construction on or before September 20, 1994.[126]

The NSPS are directly enforceable six months after promulgation.[127] The standards in emission guidelines, on the other hand, are not enforceable until EPA approves a state plan meeting the emission guidelines or issues a federal plan.[128] The Act directs EPA to use the same process for section 129 plans as for section 111(d) plans.[129] Unlike section 111(d), though, section 129 explicitly requires state plans to "be at least as protective as the guidelines promulgated by [EPA]."[130]

The emission standards in EPA's emission guidelines for large MWC are provided in 40 CFR section 60.33b.[131] Section 60.38b concerns compliance and performance testing; it adopts the compliance and performance testing provisions in the parallel NSPS for large MWC, found in subpart Eb, section 60.58b.

EPA approved Florida's section 129 state plan for large MWC on December 30, 2010.[132] Florida's plan identified the Covanta Incinerator (Miami-Dade County Resources Recovery Facility) as subject to the plan.[133] The plan simply adopted the emission standards in EPA's emission guidelines;[134] thus, according to EPA it was "at least as protective" as the guidelines.[135] The plan, like the emission guidelines, adopted the compliance and performance testing provisions in section 60.58b.[136] Furthermore, Florida's plan for emission guidelines generally states:

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[124] 42 U.S.C. § 7429(a), (b).
[125] 40 C.F.R. part 60, subpart Cb.
[126] 40 C.F.R. § 60.32b(a).
[127] 42 U.S.C. § 7429(f)(1).
[128] *Id.* § 7429(f)(2).
[129] *Id.* § 7429(b)(1).
[130] *Id.* § 7429(b)(2).
[131] 40 C.F.R. § 60.33b.
[132] 40 C.F.R. § 62.2355; 75 Fed. Reg. 82269 (Dec. 30, 2010).
[133] 75 Fed. Reg. at 82270 tbl. 1.
[134] Fla. Admin. Code R. § 62-204.800(9)(b)3.
[135] 75 Fed. Reg. at 82271.
[136] Fla. Admin. Code R. § 62-204.800(9)(b)7.a. The "except for" portion of this provision only refers to the alternative dioxin/furan performance testing schedule in Florida Administrative Code Rule 62-204.800(9)(b)7.b.

> The Emission Guidelines for Existing Sources adopted by reference in this rule shall be controlling over other standards in the air pollution rules of the Department except that any emissions limiting standard contained in or determined pursuant to the air pollution rules of the Department which is more stringent than one contained in an Emission Guideline, or which regulates emissions of pollutants or emissions units not regulated by an applicable Emission Guideline, shall apply.[137]

Thus, Florida acknowledges that its section 129 plan controls over other state requirements.

B. The Permit Must Specifically Include the Applicable Requirements in Florida's Approved State Plan

The definition of "applicable requirements" for Title V permits includes "[a]ny standard or other requirement governing solid waste incineration, under section 129 of the Act."[138] The requirements in Florida's approved plan for large MWC are therefore applicable requirements for this permit.

The relevant section in the Draft Permit for Excess Emissions states: "Rule 62-210.700 (Excess Emissions), F.A.C. cannot vary any requirement of an NSPS, NESHAP or Acid Rain program provision."[139]

However, a Title V permit must set forth the specific terms and conditions from Florida's approved plan for large MWC and cannot just "include" them in bulk.[140] The applicable requirements in Florida's approved plan for large MWC for excess emissions during periods of SSM are found in FAC 62-204.800(9)(b), which adopts EPA's requirements in subpart Eb. As explained in detail below, the excess emission conditions in Florida's approved plan are in several respects more stringent than the conditions in the Draft Permit. While a Title V permit may streamline terms and conditions from various applicable requirements, the most stringent terms and conditions must always be reflected in the permit.[141]

The Excess Emissions provisions cited in the Draft Permit have been approved, erroneously, by EPA into Florida's state implementation plan.[142] These provisions are inconsistent with the text and structure of the Act, and EPA has separately issued a "SIP call" under section 110(k)(5) requiring Florida to revise the SIP to address the substantial inadequacy created by the Excess Emissions provisions.[143]

In any case, the Excess Emissions provisions do not modify the approved section 129 state plan provisions. As noted above, the approved plan for large MWC adopted EPA's provisions for large MWC, including the compliance provisions in subpart Eb. The approved

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[137] Florida Admin. Code R. 62-204.800(9)(a)1.
[138] 40 C.F.R. § 70.2.
[139] Draft Permit at 12.
[140] *See In the Matter of Motiva Enterprises LLC Port Arthur Refinery Jefferson County, Texas*, Order Responding to Petition No. VI-2016-23 at 25-32 (May 31, 2018) (explaining how a Title V permit must include all applicable requirements)
[141] Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, "White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program," at 6-13 (Mar. 5, 1996), *available at* https://www.epa.gov/sites/default/files/2015-08/documents/wtppr-2.pdf (Attachment 51).
[142] 64 Fed. Reg. 32346 (June 16, 1999) (recodification).
[143] 80 Fed. Reg. 33840, 33962 (June 12, 2015).

plan even specifically states that the emission standards in the approved plan are "controlling over other standards in the air pollution rules of the Department." And even though EPA erroneously approved the Excess Emissions provision into Florida's SIP, SIP provisions are for the purposes of implementing, maintaining, and enforcing National Ambient Air Quality Standards,[144] and not for implementing section 129 waste incinerator emission standards. For similar reasons, new source review ("NSR") permits that Florida has issued under its SIP-approved program cannot modify section 129 state plan requirements.

C. DEP Cannot Expand the Duration of the Already Illegal SSM Exemptions in EPA's Emission Guidelines

Unfortunately for public health, affected communities, and the environment, EPA's compliance provisions in the NSPS for large MWC, which EPA also adopted in the emissions guidelines, contain exemptions from the NSPS standards for periods of SSM. Specifically, they exempt large MWC from compliance with the standards during SSM periods not to exceed 3 hours.[145] For carbon monoxide (CO) emission standards only, a malfunction causing loss of boiler water level control or loss of combustion air control is allowed to last up to 15 hours.[146]

As discussed above, the approved Florida plan for large MWC adopts these provisions. However, permit condition A.21.a purports to allow the Department to authorize malfunction periods that are longer than 3 hours.[147] This is inconsistent with, and less stringent than, the applicable requirements regarding malfunctions in Florida's approved plan which do not allow any such discretionary exemptions in excess of 3 hours. The permit condition must be revised to reflect the applicable requirement in the approved plan, and no longer allow the Department to, in its discretion, authorize malfunction periods that are longer than 3 hours. For the reasons given above, the Excess Emissions provisions cannot be used to change this applicable requirement.

Similarly, permit condition A.22.a purports to allow the Department to authorize startup, warmup, and shutdown periods that are longer than 2 hours, and specifically authorizes a 3-hour period.[148] For the same reasons as for permit condition A.21.a, the Department cannot authorize periods that are longer than 3 hours.

D. The Permit Cannot Exempt Periods of Warm-Up

Draft Permit conditions A.22.a and A.22.b purport to exempt warm-up periods from the emission standards when firing natural gas or propane. However, subpart Eb, as adopted in the approved Florida plan for large MWC, only exempts periods of startup:[149]

> The startup period commences when the affected facility begins the continuous burning of municipal solid waste and does not include any warmup period when the affected

[144] 42 U.S.C. § 7410(a)(1).
[145] 40 C.F.R. § 60.58b(a)(1).
[146] *Id.* § 60.58b(a)(1)(iii).
[147] In addition, this type of director discretion provision is not allowed in Title V permits. *See* Section XII, *infra*.
[148] This is also impermissible director discretion. *See* Section XII, *infra*.
[149] 40 C.F.R. § 60.58b(a)(1).

facility is combusting fossil fuel or other nonmunicipal solid waste fuel, and no municipal solid waste is being fed to the combustor.[150]

The permit must be revised to reflect this applicable requirement. For the same reasons as given above, the Excess Emissions provisions and NSR permits cannot be used to modify this applicable requirement.

E. The Definition of Malfunction Does Not Reflect Applicable Requirements

The malfunction exemptions in the Draft Title V Permit are contrary to the CAA. Where they nonetheless continue to exist in EPA's rules due to EPA's failure to timely address them, operating permits must still correctly reflect applicable requirements within the Act. EPA's emission guidelines for large MWC adopt the definitions in Part 60, subparts A, B, and Eb.[151] The definition of "malfunction" is provided by subpart A:

> [A]ny *sudden, infrequent, and not reasonably preventable* failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.[152]

As discussed above, Florida's approved state plan for large MWC adopts the provisions for compliance and performance testing in subpart Eb, including the malfunction provision there. It therefore adopts the definition of "malfunction" used there and provided by subpart A.

The definition of malfunction in the Draft Permit, on the other hand, is in condition A.22.a:

> [A] malfunction means any unavoidable mechanical and/or electrical failure of air pollution control equipment or process equipment or of a process resulting in operation in an abnormal or unusual manner.

The federal definition requires the malfunction to be sudden, infrequent, *and* not reasonably preventable. The definition in the Draft Permit allows malfunctions that are abnormal *or* unusual. This is not equivalent and is less stringent than the federal requirement. In any case, the Draft Permit cannot alter applicable requirements, including definitions.

Furthermore, the Draft Permit's definition of malfunction stems from Florida's SIP, which cannot modify Florida's section 129 plan for large MWC.[153] And it specifically only applies to condition A.22.a.[154] The malfunction provisions in condition A.21, which appear to reflect the compliance provisions in subpart Eb, do not have a definition of malfunction. These provisions must be given the federal definition of malfunction in subpart A to correctly reflect applicable requirements.

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[150] 40 C.F.R. § 60.58b(a)(1)(i).
[151] 40 C.F.R. § 60.31b.
[152] *Id.* § 60.2 (emphasis added).
[153] *See* Section IV.B, *supra*.
[154] Draft Permit A.20.a ("For the purposes of this specific condition …").

F. The Emission Standards Are Not Practically Enforceable Due to the Malfunction Exemption

As previously referenced, the Title V Permit must ensure that the emission standards it provides are practically enforceable. As a result of the director discretion provision that purports to allow longer periods of malfunction, the emission standards are not practically enforceable.

And, as explained above, the Permit does not even contain a relevant definition of "malfunction" as used in EPA's emission guidelines and Florida's approved state plan for large MWC. This allows the operator to claim that virtually any excess emissions can be a malfunction. In turn, this, like the director discretion provision, makes the emissions standards unenforceable.

Furthermore, in lieu of the emission standards during periods of malfunction, the Draft Permit in condition A.21.a requires: "[e]xcess emissions resulting from malfunction shall be permitted provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized." This provision is not practically enforceable because DEP does not define "best operational practices," or provide specific steps to minimize the duration of excess emissions. This not only means the provision is vague and therefore unenforceable, it also means that the relevant records to ensure practical enforceability are not specified.

G. The 1978 PSD Permit Contains Applicable Requirements That Are Not Included in the Draft Permit

The SSM exemptions are additionally unlawful as the requirements from the original prevention of significant deterioration (PSD) permit still apply, and that permit did not contain any SSM exemptions. The facility was originally issued PSD permit, PSD-FL-006, by EPA in 1978.[155] The permit included a best available control technology (BACT) limit on emissions of particulate matter, specifically 0.08 grains per dry standard cubic foot corrected to 12 percent carbon dioxide for each incinerator, without any mention of SSM exemptions.[156] In fact, the permit did not contain any exemptions for periods of SSM, and thus the Title V permit may not contain such an exemption as proposed by DEP.

PSD permits do not expire, so this is still an applicable requirement. The PM emission standard from the Florida plan for large MWC, 25 milligrams per dry standard cubic meter at 7% oxygen, cannot be used to streamline away the PSD PM emission limit, as the section 129 emission standard has an SSM exemption and is therefore less stringent during periods of SSM than the PSD PM emission limit.[157]

Over the years, the Department has issued several permits that are styled as PSD permits.[158] However, none of them appear to be for major modifications of the Covanta Incinerator. Instead, they generally involve minor modifications. None of these permits can

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[155] Miami Dade-County Resources Recovery Facility PSD Permit, PSD-FL-006 (Jan. 1977) (Attachment 52).
[156] *Id.* at 4.
[157] Furthermore, the Department must demonstrate that the 25 mg/cubic meter limit is more stringent than the 0.08 grain/cubic foot limit in order to streamline for normal, i.e. non-SSM, operations.
[158] Permits PSD-FL-006A to -006G.

permissibly amend the original PSD permit to create SSM exemptions in the original PSD permit PM emission limit, because BACT must apply on a continuous basis.

Specifically, PSD permits must apply BACT "for each pollutant subject to regulation" under the Act that is emitted by or caused by the source.[159] BACT is defined as:

> [A]n emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.[160]

"Emission limitation" is defined by the Act as:

> [A] requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis,* including any requirement relating to the operation or maintenance of a source *to assure continuous emission reduction*, and any design, equipment, work practice or operational standard promulgated under [the Act].[161]

As a result of the requirement for limitation of pollutants "on a continuous basis," a BACT limit must apply at all times, including periods of startup and shutdown.[162] A permitting authority may set separate standards for periods of startup and shutdown, including work practice standards if a numeric BACT limit can be shown to be infeasible, but these standards must reflect BACT.[163] On the other hand, a malfunction by definition is a sudden and unforeseeable event, and therefore permitting authorities are unlikely to be able to define a BACT standard to apply during a malfunction. Instead, a malfunction that results in excess emissions is always a violation.

The requirement for BACT to apply on a continuous basis is an applicable requirement for this permit. As the Tenth Circuit Court of Appeals recently explained, EPA's definition of "applicable requirements" for Title V includes requirements in Florida's SIP.[164] The relevant requirements in Florida's SIP start with the approved definition of BACT, in Florida Administrative Code Rule 62-210.200(34). It uses the term "emission limitation," which in turn is defined in the SIP as:

> Any restriction established in or pursuant to a regulation adopted by the Department which limits the quantity, rate, concentration or opacity of any pollutant released, allowed to escape or emitted, whether intentionally or unintentionally, into the atmosphere, including any restriction which prescribes equipment, sets fuel specifications, or

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[159] 42 U.S.C. § 7475(a)(4).
[160] *Id.* § 7479(3).
[161] *Id.* § 7602(k) (emphasis added).
[162] *E.g., In re Indeck-Elwood, LLC*, PSD Appeal 03-04, 13 E.A.D. 126, 171-81 (E.A.B. 2006), *available at* https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision~Date/5B6EB58DEDF35ABC852571F6006865E3/$File/Indeck.pdf (Attachment 53).
[163] *Id.*
[164] *Sierra Club v. U.S. EPA*, 964 F.3d 882, 890-97 (10th Cir. 2020).

prescribes operation or maintenance procedures for an emissions unit to assure emission reduction or control.[165]

While this definition does not contain the same "continuous" qualifier as the Act's definition, it must be interpreted to do so. Under EPA's rules for PSD programs in 40 C.F.R. section 51.166, states must use EPA's exact wording of defined terms unless the state demonstrates that the submitted definition is at least as stringent in all respects as EPA's definition.[166] EPA's definition of BACT uses the term emission limitation,[167] which for the purposes of section 51.166 is found in section 51.100:

> [A] requirement established by a State, local government, or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, or prescribe operation or maintenance procedures for a source to assure *continuous emission reduction*.[168]

Any PSD program that uses a definition of "emission limitation" that allows for exemptions is necessarily less stringent than under EPA's definition and would thus be unlawful. Since the Florida PSD program as approved in the SIP must be interpreted to require continuous emission limits for BACT, no Florida new source review permit can have introduced an SSM exemption into the 1978 PSD permit PM BACT limit. However, the Draft Permit contains an SSM exemption for PM emissions. This is contrary to the requirement for continuous application of BACT, which, as explained in *Sierra Club v. U.S. EPA*, is an applicable requirement under EPA's definition of the term.

This is not a case of second-guessing a BACT determination in a new source review permit. The technology determinations for sources in new source review permits are generally not specifically included in the SIP (unless the state relies on them for other purposes, such as demonstrating attainment). Thus, these technology determinations are only applicable requirements through the second part of EPA's definition of "applicable requirements." Instead, this is a case of the permit not reflecting an applicable requirement in the SIP: continuous application of BACT.

V. THE FUELS TERMS AND CONDITIONS DO NOT REFLECT APPLICABLE REQUIREMENTS

Section 129 of the Act regulates solid waste incinerator units, defined as:

> [A] distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels).[169]

[165] Fla. Admin. Code R. 62-210.200(96).
[166] 40 C.F.R. § 51.166(b).
[167] *Id.* § 51.166(b)(12).
[168] *Id.* § 51.100(z) (emphasis added).
[169] 42 U.S.C. § 7429(g)(1).

However, the term does not include or authorize combustion of hazardous waste, which is permitted under section 3005 of the Solid Waste Disposal Act.[170]

Furthermore, municipal waste (called municipal solid waste in EPA's regulations) is defined and limited under the CAA to:

> [R]efuse (and refuse-derived fuel) collected from the general public and from residential, commercial, institutional, and industrial sources consisting of *paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other combustible materials and non-combustible materials such as metal, glass and rock*, provided that: (A) the *term does not include industrial process wastes or medical wastes that are segregated from such other wastes*.[171]

Therefore, for the permit to correctly reflect applicable requirements, it must limit fuels (in other words, the municipal waste incinerated for power generation) to the specified wastes in the definition of municipal waste and prohibit:

- Hazardous waste;
- Segregated industrial process waste; and
- Segregated medical waste.

EPA's regulations are in accordance with the above. EPA's emission guidelines for large MWC adopt the NSPS definition of municipal solid waste, which specifically excludes "industrial process or manufacturing wastes" and "medical wastes."[172] On the other hand, for example, a hospital/medical/infectious waste incinerator ("HMIWI") is separately defined as "*any device* that combusts *any amount* of hospital waste and/or medical/infectious waste."[173]

Thus, hazardous waste,segregated medical waste. and segregated industrial waste may not be processed at this facility. However, the Draft Permit contains deficiencies with respect to all three categories of waste: it creates an illegal knowledge exemption for incineration of medical waste, it does not contain sufficient conditions to ensure that used oil to be burned is not hazardous waste, and it does not prohibit incineration of segregated industrial waste.

A. DEP Cannot Create a Knowledge Exemption from Applicable Requirements for Medical Waste

Permit condition A.7.b provides that the Covanta facility "shall not *knowingly* burn… untreated biomedical waste from biomedical waste generators … and other similar generators (or sources)" or "segregated loads of biological waste" (emphasis added). The "knowingly" provision is unlawful because the Clean Air Act is a strict liability regime.[174] A violator's state of mind only matters for civil and criminal penalties, not liability.[175] Therefore, the Covanta Incinerator violates the CAA and is strictly liable if it burns any untreated biomedical waste from

[170] 42 U.S.C. § 6925(a).
[171] 42 U.S.C. § 7429(g)(5) (emphasis added).
[172] 40 C.F.R. § 60.51a (definition of "municipal solid waste").
[173] *Id.* § 60.51c (NSPS definition) (emphasis added); *see also id.* § 60.31e (adopting the HMIWI NSPS definitions for the HMIWI emission guidelines).
[174] *See generally* 42 U.S.C. § 7413.
[175] *Id.* § 7413(c) (criminal penalties), (e)(1) ("full compliance history and good faith efforts to comply" as factor in civil penalties).

medical waste generators or segregated load of medical waste (regardless of whether the operator knew that the segregated load was medical waste).

Because the first part of permit condition A.7.b applies to untreated biomedical waste, regardless of whether it is segregated, and because the term "biological waste" in the second part of the condition is undefined and could include medical waste as defined in EPA's regulation, this *mens rea* provision in the draft permit creates an exemption to liability contrary to law and regulation as to the processing of medical waste.

None of the sources cited by DEP for this provision in the draft permit give it authority to change the Act's strict liability regime. As explained above, the Excess Emission rule and NSR permits cannot modify section 129 requirements. And Florida's approved section 129 plan for large MWC does not contain any *mens rea* exemption for medical waste.

Finally, this provision is not practically enforceable.[176] While there is recordkeeping regarding the composition of waste, there is no recordkeeping requirement (nor could there be) as to the state of mind of the operator as they process waste. DEP must remove the defective provision and replace it with one that creates strict liability for incineration of untreated biomedical waste from medical waste generators or segregated loads of medical waste.

B. The Permit Must Prohibit Burning of Segregated Industrial Process Waste

As explained above, the CAA excludes segregated industrial process waste from its definition of municipal waste.[177] Similarly, EPA's emission guidelines exclude industrial process waste from the definition of municipal solid waste.[178] As Florida's approved state plan for large MWC adopts EPA's emission guidelines, the Permit must prohibit burning of industrial process waste. However, industrial process waste is not listed as a prohibited fuel in Permit condition A.7.b. Furthermore, the director discretion provision that allows burning of waste from industrial and manufacturing activities if it is "substantially similar" to municipal solid waste, condition A.7.g.(8), creates the possibility that the Department will authorize burning of industrial process waste under this provision.

C. The Permit Does Not Contain All Applicable Requirements for Burning Used Oil and Oil Filters

Permit condition A.7.g(7) allows burning of used oil and oil filters. Permit condition A.7.g(6) allows burning of waste materials that contain oil (including used oil) and permit condition A.7.g(2) allows burning of oil spill debris (without specifying whether the oil is used). While permit condition A.7.b prohibits burning of used oil, except for used oil generated on-site, this condition appears to only apply to permit conditions A.7.d through A.7.f, and not to the non-MSW waste specified in A.7.g.[179]

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[176] *See, e.g.*, section XII, *infra*, regarding practical enforceability.
[177] 42 U.S.C. § 7429(g)(5).
[178] 40 C.F.R. § 60.51a (definition of "municipal solid waste").
[179] In any case, the applicable requirements described below also apply to used oil generated on-site.

The only limitation permit condition A.7.g(7) places on burning used oil is for polychlorinated biphenyl (PCB) concentration, a requirement stemming from the Toxic Substances Control Act.[180]

Under EPA's regulations for the Solid Waste Disposal Act, burning used oil for energy recovery, as is the case at the Covanta Incinerator, is not subject to the general requirements for management of used oil in 40 C.F.R. Part 279 if it meets the allowable levels of arsenic, cadmium, chromium, and lead, as well as flash point and total halogen standards.[181] Used oil with total halogen levels above 1000 ppm is presumed to be hazardous waste, which cannot be burned at this facility.

Used oil that does not meet the specifications ("off-specification used oil") may be burned in utility boilers.[182] A "boiler" is defined, in part, to:

- Have an integral design for the combustion chamber and primary energy recovery section;
- Maintain a 60% thermal energy recovery efficiency; and
- Export and utilize at least 75% of the recovered energy.[183]

In the alternative, the EPA Regional Administrator can determine a unit is a boiler on a case-by-case basis, after considering certain variance standards.[184] The Statement of Basis for the Draft Permit does not contain enough information to determine if the Covanta Incinerator units meet this definition of "boiler," but based on the description of the boilers as "external combustion boilers" it seems unlikely that the units have an integral design. If there is such information, DEP must re-notice the Draft Permit and give the public an opportunity to comment on it. If the incinerator units do not meet the definition of "boiler," then the limits on levels of arsenic, cadmium, chromium, and lead along with the flash point and total halogen standards must be included in the permit, along with sufficient recordkeeping and test methods to ensure compliance.

Even if the Covanta incinerator units can be classified as boilers for purposes of the used oil regulations, the presumption that the used oil is hazardous waste if it has total halogen levels above 1000 ppm still applies.[185] Thus, the Draft Permit does not contain all applicable requirements for burning used oil. Furthermore, there must be sufficient recordkeeping and test methods for ensuring the used oil meets specifications and is not hazardous waste.

The Draft Permit also allows burning of oil filters as well as materials containing used oil. Under EPA regulations, such materials can only be burned (without being considered as used oil) if "the used oil has been properly drained or removed to the extent possible such that no visible signs of free-flowing oil remain in or on the material."[186] This includes contaminated materials that are burnt for energy recovery.[187] The Permit must reflect the applicable

[180] 40 C.F.R. § 761.20(e).
[181] 40 C.F.R. § 279.11 tbl. 1.
[182] *Id.* § 279.61(a)(2)(ii).
[183] *Id.* § 260.10.
[184] *Id.* § 260.32.
[185] *Id.* § 279.63.
[186] *Id.* § 279.10(c)(1).
[187] *Id.* § 279.10(c)(2).

requirement for contaminated materials, including a requirement to examine the materials for visible signs of free-flowing oil and corresponding recordkeeping.

D. The Permit Must Reference the Specific Definitions for Prohibited Materials

Permit condition A.7.b prohibits (apart from the impermissible director discretion provision discussed below) burning of materials such as hazardous waste, nuclear waste, and sewage sludge. However, except for beryllium-containing waste, the permit does not reference the regulatory definitions of these materials. For example, the permit should reference the definition of sewage sludge found in EPA's rules for sewage sludge incinerators in 40 CFR Part 60, Subparts EEEE.[188]

E. The Director Discretion Provisions Must Be Removed

Permit condition A.7.h states: "[o]ther fuels or wastes shall not be burned in the emissions units without prior specific written approval from the Division of Air Resource Management of the Department of Environmental Protection." As explained elsewhere,[189] this type of director discretion provision is not permissible. Furthermore, it creates the possibility that DEP will approve incineration of materials, such as medical waste or hazardous waste, that are not allowed by applicable requirements. Permit condition A.7.b, which purports to prohibit burning of hazardous (and knowing burning of medical waste), appears to only apply to permit conditions A.7.d through A.7.f.

Similarly, condition A.7.g(8) contains impermissible director discretion. Because it only imposes nebulous boundaries ("substantially similar") on DEP's discretion, it also creates the possibility that the Department will approve incineration of materials that are not allowed by applicable requirements.

VI. THE DRAFT PERMIT LACKS MONITORING REQUIREMENTS TO ASSURE COMPLIANCE WITH EMISSION LIMITS

The CAA requires that "[e]ach permit issued under [Title V] shall set forth… monitoring… requirements to assure compliance with the permit terms and conditions."[190] As EPA has explained: "if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting authorities must supplement monitoring to assure such compliance. 40 C.F.R. § 70.6(c)(l)."[191] EPA's Administrator has further explained that:

> [T]he rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5). The determination of whether monitoring is adequate in a particular circumstance generally is a context-

[188] *See id.* § 60.4930 (definition of sewage sludge).
[189] *See* section XII*, infra*, regarding director discretion.
[190] 42 U.S.C. § 7661c(c).
[191] *In the Matter of CITGO Refining and Chemicals Co., L.P., West Plant, Corpus Christi, Tx*., Order on Petition No. VI-2007-01 (May 28, 2009) ("*CITGO Order*") at 7; *see Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); *see also In the Matter of Public Service of New Hampshire*, Order on Petition No. VI-2014-04 (July 28, 2015) at 14; *In the Matter of EME Homer City Generation LP Indiana County, Penn.*, Order on Petition Nos. III-2012-06, III-2012-07, III-2013-02 (July 30, 2014) ("*Homer City Order*") at 45.

specific determination . . . [and] such a determination generally will be made on a case-by-case basis [taking into consideration] other site-specific factors.[192]

Monitoring requirements that are insufficient "to assure compliance" with the emission limits have absolutely no place in a permit. Compliance must be demonstrated continuously and consistently with the timeframe in the limits (*e.g.*, hourly or daily), not once a year.

A. The Draft Permit Lacks Clarity Regarding Compliance Averaging Time

The Draft Title V Permit contains the following emission limitations and standards and explains that "[u]nless otherwise specified, the averaging times for Specific Conditions A.11 through A.18 are based on the specified averaging time of the applicable test method…":[193]

Unless otherwise specified, the averaging times for Specific Conditions **A.11** through **A.18** are based on the specified averaging time of the applicable test method.

A.11. Visible Emissions. As determined by the COMS, the maximum emission limit for opacity shall not exceed 10% (6-minute block average). The COMS data may be used as evidence to determine compliance with the opacity standard. Consent Order OGC File No. 05-1530 mandates that the permittee comply with all requirements of the Visible Emissions Reduction Plan that identifies the preventative measures the facility will take to minimize opacity excursions. This Plan is included in the Title V air operation permit renewal as an Appendix. [Rules 62-212.400(BACT) & 62-204.800(9)(b)3.b., F.A.C.; 40 CFR 60.33b(a)(1)(iii), F.A.C.; Consent Order OGC File No. 05-1530; and, Permit No. 0250348-011-AC/PSD-FL-006G, Specific Condition A.12]

A.12. Particulate Matter. As determined by stack tests, the maximum emission limit for PM shall not exceed 25 milligrams per dry standard cubic meter (mg/dscm) at 7% oxygen (O_2). [Rules 62-204.800(9)(b)3.a. & 62-212.400(BACT), F.A.C.; 40 CFR 60.33b(a)(1)(i); and, Permit No. 0250348-011-AC/PSD-FL-006G, Specific Condition A.12]

A.13. Sulfur Dioxide. As determined by the CEMS, the maximum emission limit for SO_2 shall not exceed 29 parts per million by volume (ppmvd) at 7% O_2. (dry basis), based on a 24-hour daily geometric mean, or 75% (by weight or by volume) removal efficiency, whichever is less stringent. [Rules 62-204.800(9)(b)3.e. & 62-212.400(BACT), F.A.C.; 40 CFR 60.33b(b)(3)(i); and, Permit No. 0250348-011-AC (PSD-FL-006G), Specific Condition A.12]

A.14. Nitrogen Oxides. As determined by the CEMS, the maximum emission limit for NO_X shall not exceed 250 ppmvd at 7% O_2, on a dry basis, based on a 24-hour daily arithmetic block average. [Rule 62-204.800(9)(b)3.h., F.A.C.; 40 CFR 60, Subpart Cb, Table 1; and, Permit No. 0250348-011-AC/PSD-FL-006G, Specific Condition A.12]

A.15. Carbon Monoxide. As determined by the CEMS, the maximum emission limit for CO shall not exceed 250 ppmvd at 7% O_2, on dry basis, based on 24-hour block geometric mean. [Rule 62-204.800(9)(b)3.i., F.A.C.; 40 CFR 60, Subpart Cb, Table 3; and, Permit No. 0250348-011-AC/PSD-FL-006G, Specific Condition A.12]

A.16. Dioxin/Furan. As determined by stack tests, the maximum emission limit for dioxins/furan shall not exceed 30 nanograms (ng)/dscm total mass, at 7% O_2. [Rule 62-204.800(9)(b)3.g., F.A.C.; 40 CFR 60.33b(c)(1)(iii); and, Permit No. 0250348-011-AC/PSD-FL-006G, Specific Condition A.12]

A.17. Hydrogen Chloride. As determined by stack tests, the emission limit for HCl shall not exceed 25 ppmvd, at 7% O_2, on dry basis, or 5% of the potential hydrogen chloride emission concentration (95% reduction by weight or volume), whichever is less stringent. [Rule 62-204.800(9)(b)3.f., F.A.C.; 40 CFR 60.33b(b)(3)(ii); and, Permit No. 0250348-011-AC/PSD-FL-006G, Specific Condition A.12]

A.18. Cadmium. As determined by stack tests, the maximum emission limit for cadmium (Cd) shall not exceed 35 µg/dscm, at 7% O_2 dry basis. [Rule 62-204.800(9)(b)3.c., F.A.C.; and, ~~(see~~ 40 CFR 60.33b(a)(2)(i)~~)~~]

A.19. Lead. As determined by stack tests, the maximum emission limit for lead shall not exceed 400 micrograms (µg)/dscm, at 7% O_2. [Rule 62-204.800(9)(b)3.c., F.A.C.; and, ~~(see~~ 40 CFR 60.33b(a)(4)~~)~~]

A.20. Mercury. As determined by stack tests, the maximum emission limit for Hg shall not exceed 50 µg/dscm at 7% O_2, or 85% reduction (by weight or volume), whichever is less stringent. [Rule 62-204.800(9)(b)3.d, F.A.C.; 40 CFR 60.33b(a)(3); and, Permit No. 0250348-011-AC/PSD-FL-006G, Specific Condition A.12]

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However, a review of the EPA Test Methods finds that there are no averaging times in the methods. The PSD permit also lacks an averaging time for these pollutants. Where an

[192] *CITGO Order* at 7-8; *see also Homer City Order* at 45.
[193] Draft Title V Permit at 12.

emission limit lacks an averaging time, the emission limit is assumed to apply continuously. That is, the limit must be met at every instance in time. The Draft Title V Permit lacks provisions to ensure that the emission limits are met continuously.

Table 3. Pollutants, Averaging Times and Methods of Compliance.

Pollutant[194]	Averaging Time (As noted in Draft Title V Permit or Test Method)[195]	PSD Permit No. PSD-FL-006G
Particulate Matter	None, thus the emission limit must be met continuously	EPA Method 5[196, 197] and Method 9[198, 199]
Mercury	None, thus the emission limit must be met continuously	Method 29[200, 201]
Cadmium	None, thus the emission limit must be met continuously	No method specified
Lead	None, thus the emission limit must be met continuously	No method specified
Hydrogen Chloride	None, thus the emission limit must be met continuously	Methods 26 or 26A[202, 203]
Dioxins/Furans	None, thus the emission limit must be met continuously	Method 23[204, 205]

In sum, the final permit must include provisions to identify test methods where they are lacking, and also include monitoring provisions to assure that the emission limitations are met continuously.

[194] Draft Permit Limitations and Standards, A.12. (Particulate Matter) (for this permit condition the permit references PSD-FL-006G, Specific Condition A.12, but there is no condition so labeled in that permit. The Draft Title V permit lacks an averaging time for demonstrating compliance), A.16. (Dioxins/Furans) (for this permit condition the permit references PSD-FL-006G, Specific Condition A.12, but there is no condition so labeled in that permit.), A.17. (Hydrogen Chloride) (for this permit condition the permit references PSD-FL-006G, Specific Condition A.12, but there is no condition so labeled in that permit. The Draft Title V permit lacks an averaging time for demonstrating compliance), A.19 (Lead) (for this permit condition the permit references "Rule 62-204.800(9)(b)3.c., F.A.C. (see 40 CFR 60.33b(a)(4))"),
A.20. (Mercury) (for this permit condition the permit references PSD-FL-006G, Specific Condition A.12, but there is no condition so labeled in that permit. The Draft Title V permit lacks an averaging time for demonstrating compliance), A.18. (Cadmium)(for this permit condition the permit references "Rule 62-204.800(9)(b)3.c., F.A.C. and 40 CFR 60.33b(a)(2)(i)").
[195] Draft Title V Permit at 10.
[196] FL DEP 1994 PSD Permit at 9.
[197] Appendix A-3 to Part 60 - Test Method 9.
[198] FL DEP 1994 PSD Permit at 11.
[199] Appendix A-3 to Part 60 - Test Method 9.
[200] FL DEP 1994 PSD Permit at 11.
[201] Appendix A-3 to Part 60 - Test Method 29,
[202] FL DEP 1994 PSD Permit at 11.
[203] Appendix A-3 to Part 60 - Test Methods 26 or 26A
[204] FL DEP 1994 PSD Permit at 11.
[205] Appendix A-3 to Part 60 - Test Method 23.

B. Annual Stack Tests are not Adequate to Demonstrate Compliance with Emission Limits

The final permit must contain provisions to ensure the permit applicant complies with the emission limits for the following: PM, opacity, cadmium, Hg, lead, HCl, and D/F. The Draft Permit, however, requires only an annual stack test to determine compliance with the emission limits for these pollutants.[206] An annual stack test is insufficient to ensure that the facility is complying with emission limits for these pollutants.[207]

Several considerations demonstrate that an annual stack test for these six pollutants is inadequate. First, DEP has not demonstrated how the annual stack test ensures continuous compliance. An annual stack test does not bear a rational relation to the duration of the standards for these pollutants. A single stack test cannot reflect the variability in emissions throughout the range of operating conditions or the potential for emissions to change over time due to the wide variability in the content of materials incinerated at the facility. Next, the facility uses add-on controls to meet the emission limits; thus more frequent testing is needed for the facility to demonstrate that the add-on controls are functioning as required. A test conducted just once per year does not demonstrate compliance with the National Ambient Air Quality Standards (NAAQS). Finally, DEP's proposal to just require an annual test weakens the short-term limits.

Additionally, there is readily available monitoring technology available that is more frequent and more accurate than an annual stack test. Notably, compliance with the emissions limitations for all these pollutants can and must be demonstrated continuously using continuous emissions monitoring systems (CEMS). DEP should include requirements for CEMS in the Title V permit for these six pollutants.

VII. DEP MUST INCLUDE ADDITIONAL MONITORING CONDITIONS TO PROVIDE TRANSPARENCY AND AVAILABILITY TO THE PUBLIC

DEP must follow the lead of other states (*e.g.,* Pennsylvania), where Covanta is now reporting some of its emission data online to the public, including CEMS data for the following pollutants: CO, SO_2, NO_X, opacity and HCL.

Figure 1: Example of Pennsylvania's CEMS data system[208].

Reference Info		Carbon Monoxide (CO) Maximum 24Hr	Sulfur Dioxide (SO2) Maximum 24Hr	or Removal Efficiency	Nitrogen Oxides (NOx) Maximum 24Hr	Opacity (stack) Maximum 6min	Hydrogen Chloride (HCL) Maximum 24Hr
Permit Limit		100	29	>= 80%	180	10	25
Actual Data							
10/12/2021	Unit 1	54	12	93.2	128	0	0.7
10/12/2021	Unit 2	47	21	86.5	130	0	3.3
10/12/2021	Unit 3	37	2	99.7	113	1	0.3

[206] Draft Permit Condition A.35., at 21.
[207] *See Sierra Club v. U.S. Env'tl. Prot. Agency*, 536 F.3d 673, 675 (D.C. Cir. 2008) (specifically noting that annual testing is unlikely to assure compliance with a short term emission limit, and finding that state permitting authorities have a statutory duty to include monitoring requirements that ensure compliance with emission limits in Title V operating permits).
[208] Covanta Emissions Data for the Delaware Valley Facility, https://www.covanta.com/where-we-are/our-facilities/delaware-valley.

This also shows that CEMS are feasible for these pollutants for the Covanta facility.

Moreover, DEP's Oculus search engine system is highly technical, notoriously not user-friendly, and difficult to navigate, presenting a roadblock to the environmental justice community's ability to access and interpret the Covanta Incinerator's emission data. These roadblocks are exacerbated by the fact that 28% of the community surrounding the incinerator are linguistically isolated, a proportion that stands in stark contrast to the region, where an average of 4% of the population is linguistically isolated.[209] DEP should require Covanta to report emission data online in an easy-to-use, easy-to-understand format, in English, Spanish, and any other language reflective of the population in proximity to the incinerator. Such data should include complaints logged to Doral's 311 odor hotline, also making publicly available how each complaint is resolved. The community surrounding the incinerator deserves transparency and has a right to know and understand the environmental hazards to which they are or might be exposed.

Additionally, given ongoing complaints about the Covanta Incinerator, DEP must add provisions similar to those in an Oregon permit for a similar MWC, which requires the permittee to maintain a log of all complaints made to a responsible official or a designated regarding fugitive emissions, air quality nuisance conditions, or particulate matter fallout from the permitted facility, for monitoring pertaining specified permit conditions. Such a log must also include a record of the permittee's actions to investigate, make a determination as to the validity of the complaint, and the date and corrective actions taken and to resolve the problem.[210]

Lastly, Covanta, through fees to cover Title V program costs, should cover the costs to make this information publicly available, so that the public can better understand the emissions and pollutants to which they are being exposed at any given period of time.

VIII. THE DRAFT TITLE V MUST IDENTIFY THE SIP ODOR REGULATION AS AN APPLICABLE REQUIREMENT AND CONTAIN CONDITIONS TO CONTROL AND MONITOR ODOR EMISSIONS

Offsite odor complaints are an ongoing and persistent issue impacting the adjacent environmental justice communities. These continuing violations are not allowed under the Florida State Implementation Plan (SIP). The only provision in the Draft Title V Permit regarding odor emissions is found in FW2, which reads as follows:[211]

> **FW2. Not federally Enforceable.** Objectionable Odor Prohibited. No person shall cause, suffer, allow or permit the discharge of air pollutants, which cause or contribute to an objectionable odor. An "objectionable odor" means any odor present in the outdoor atmosphere which by itself or in combination with other odors, is or may be harmful or injurious to human health or welfare, which unreasonably interferes with the comfortable use and enjoyment of life or property, or which creates a nuisance. [Rule 62-296.320(2) and 62-210.200(Definitions), F.A.C.]

[209] EJSCREEN Report at 2.

[210] Oregon Department of Environmental Quality, Oregon Title V Operating Permit, Covanta Marion, Inc., Permit number: 24-5398-TV-01 at 21, Permit Condition 55 (Expiration date: Sept. 1. 2025) (Attachment 54). While this particular permit condition is a state-only provision in Oregon, in order to ensure facility-wide monitoring protective of the environmental justice communities adjacent to Covanta and consistent with the Title V requirements for periodic monitoring, DEP must include similar requirements in the Title V permit.

[211] Draft Permit at 4.

As the numerous, continuous complaints over the past few years demonstrate, the environmental justice community adjacent to the incinerator and its operations is frequently prohibited from enjoying life outside their homes: the nauseating odors are just too powerful and overwhelming to breathe. The Draft Title V Permit lacks enforceable permit provisions to address odors.[212]

A. The Covanta Facility Has Failed to Address Numerous and Ongoing Odor Complaints

There is a long history of odor problems in the vicinity of the Covanta facility. The City of Doral established an odor complaint hotline in 2009. In 2014, the City issued a report about the odor problems. [213] By February 2014, the City had received over 400 complaints, and in the past 5 years, the city has received over 3,500 complaints to the hotline.[214] Many of these complaints, as cited below, specifically identify the Covanta Incinerator as the source of noxious odors, despite the fact that there is another potential source of odor in the area: the Medley Landfill. Moreover, it is possible to distinguish the sources of odor between the landfill and in the incinerator.[215] And just because the Medley Landfill is an additional source of odor does not diminish the complaints of residents, but rather, supports the need for the most stringent odor protections here due to the multiple and cumulative sources of odor impacts on the community.

Based on its review, the City recommended, among other things:

> A detailed review of the design and operations of the WTE plant should be performed to determine if the existing odor management techniques are adequate at addressing both fresh trash and compost odors from the facility. The operations review should focus on operations during the weekends and during shutdown event at the WTE plant to verify that the back-up odor management systems are adequately addressing off-site odors.[216]

The City also recommended additional monitoring upwind and downwind of the Covanta facility.[217]

Despite these efforts by the City, the odor problems persist. According to records obtained from City of Doral's Odor Complaint Log, between January 19, 2016 to September 8, 2021, more than 3,500 complaints were filed regarding odors.[218] Residents reported, for example:

- 72 straight hours of terrible garbage smell. This is the worst city in the USA to live.[219]

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[212] 40 CFR § 70.5(c)(3)(v) (identification and description of air pollution control equipment and compliance monitoring devices or activities; 40 CFR § 70.5(c)(3)(vii) (other information required by any applicable requirement.)
[213] Odor Monitoring Evaluation Report, City of Doral, Florida, at 1 (Feb. 7, 2014) ("Odor Monitoring Evaluation Report") (Attachment 55).
[214] *See* Odor Complaint Log.
[215] *See, e.g.,* Odor Monitroing Evaluation Report at 7-8.
[216] *Id.* at 11-12. The report uses the acronym WTE (waste to energy) to identify the Covanta facility.
[217] *Id.* at 12.
[218] Odor Complaint Log.
[219] *Id.* , Entry 3404 at page 133.

- El olor a basura es Asqueroso. Por favor tengan consideración, esto es una Comunidad que merece respeto.[220]
- There is a very intense odor that makes it difficult to be outside. It smells like acid garbage. Very intense but difficult to describe.[221]
- Nauseabundo olor! No se puede respirar! Increíble la falta de consideración y respeto con nosotros residentes de Doral.[222]

And many specifically identify Covanta:

- Very strong bad odor coming from Covanta Facility forcing residents to stay indoors and impeding to spent outdoors activities. Frequent odor exposure is causing visitors and residents dizziness, nauseas and a lot of stress.[223]
- Smell from Covanta plant is terrible in our neighborhood.[224]
- Smell from Covanta Plant smells everywhere in our neighborhood and it's a Sunday during the day! Please help maintain this to a minimum.[225]
- Odor from Covanta Energy recycling plant emitting odor causing eyes and throat to burn after only 5-10 minutes outside with children. Sunday 7:30pm 8/8/2021[226]
- It is a foul odor that makes it unbearable to be outside. The scent is strong and it has a rotten odor - which if you stay out long enough it lingers on your clothing. We never know when they will be burning the trash and have had guests over and cannot host outdoors.[227]

Given the volume of complaints and the specificity of some, the permit applicant here has failed to control odors as required by the Florida SIP. Based on our review of the records, Miami-Dade County and Covanta have responded to only a few of the complaints. Covanta's response has almost always been that there was no odor or the odor systems were working properly.[228] This is an unacceptable and deficient response to the nuisance and harms to residents near the incinerator.

Despite the tremendous adverse impact on the adjacent environmental justice neighborhoods and complaints that have clearly expressed these ongoing issues, the Draft Title V Permit lacks any consideration of this issue. Moreover, based on our review of the construction permit record, DEP has entirely ignored the odor issue. In short, DEP has not disclosed to the public as a part of its proposed approval of the renewal application whether it required the permit applicant to assess the sources of the odors, and also required testing to determine the pollutants

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[220] *Id.* Entry 3548, Complaint No. ODOR-117 at page 137.
[221] *Id.* Entry 3553, Complaint No. ODOR-122 at page 137.
[222] *Id.* Entry 3549, Complaint No. ODOR-118 at page 137.
[223] *Id.* Entry 3546, Complaint No. ODOR-115 at page 137. *See also, e.g.,* Entry 3483, Complaint No. ODOR-52 at page 136 ("Investigate what happen in Covanta-On May 8 and 9").
[224] *Id.*, Entry 3432, Complaint No. ODOR-1 at page 134.
[225] *Id.*, Entry 3441, Complaint No. ODOR-10 at page 135.
[226] *Id.*, Entry 3564, Complaint No ODOR-133 at page 137.
[227] *Id.*, Entry 2736 at page 105.
[228] *See, e.g.*, William H. Clements' (Covanta employee's) emails responding to 311 Odor Hotline complaints, received from the City of Doral in response to a public records request (Attachment 56). As the odor regulations and permit conditions are federally enforceable, the requirements to operate these odor systems, along with corresponding monitoring, recordkeeping, and reporting must be made part of the title V permit. *See* Section VIII, *infra*.

emitted. Moreover, given the ongoing complaints, merely renewing the prior Title V with the same permit conditions will do nothing to control odors. Finally, DEP must require a compliance plan to bring the source into compliance with the SIP odor regulations.

As discussed in more detail below, federal odor regulations are applicable to this Title V permit, in turn warranting stringent conditions to control, monitor, keep records of, report, and resolve complaints regarding odors. DEP's Draft Title V Permit unlawfully ignores these issue.

B. The Odor Regulations Are Federal Requirements

The Clean Air Act requires that the Title V permit include "enforceable emission limitations and standards. . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the *applicable implementation plan*."[229] EPA's Title V regulations define "applicable requirement" to include, among other things, any standard or other requirement provided for in the applicable SIP.[230] If a state air pollution control has been approved by EPA into the SIP, it is an "applicable requirement" under Title V.[231]

Additionally, § 70.6(b) of EPA's Title V regulations also provides that all terms and conditions in a Title V permit are enforceable by citizens and EPA—except for terms and conditions that are not required under the Act or under any of its applicable requirements and that a state permitting authority specifically designates as not being federally enforceable. "The [Title V] permit. . . contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source. In a sense, a permit is a source-specific bible for Clean Air Act compliance."[232]

The Draft Permit identifies the Covanta Incinerator as subject to the Florida odor regulations and contains the following permit provision:

> No person shall cause, suffer, allow or permit the discharge of air pollutants, which cause or contribute to an objectionable odor. An "objectionable odor" means any odor present in the outdoor atmosphere which by itself or in combination with other odors, is or may be harmful or injurious to human health or welfare, which unreasonably interferes with the comfortable use and enjoyment of life or property, or which creates a nuisance.[233]

The Draft Permit cites the State's odor regulation (F.A.C. 62-296.320(2))[234] and the regulations that contain the definitions, which includes definitions for "odor" and "objectionable

[229] 42 U.S.C. § 7661c(a) (emphasis added).
[230] 40 C.F.R. § 70.2.
[231] *Id*.
[232] *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (citations omitted).
[233] Draft Permit Provision FW 2 at 4.
[234] Fla. Admin. Code R. 62-296.320(2) "Objectionable Odor Prohibited - No person shall cause, suffer, allow or permit the discharge of air pollutants which cause or contribute to an objectionable odor."

odor."[235] These regulations are part of the EPA-approved Florida SIP and therefore are applicable requirements under the Title V regulations.[236, 237]

Florida's Draft Permit erroneously characterizes the SIP odor regulations as "state-only."[238] By characterizing the SIP odor regulation in this manner Florida is proposing to exclude the SIP odor requirements from the SIP, which is contrary to the requirements in 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.6(a)(1). Furthermore, Florida is impermissibly limiting the ability of citizens and EPA to enforce the federally enforceable odor regulation in the draft permit. Florida must revise the Draft Permit and correctly characterize the odor regulation requirements as federally enforceable for this and the other permit provisions that are necessary to make the odor regulation practically enforceable.

C. The Draft Permit Fails to Contain Applicable Requirements for Odor in the SIP-Approved Permit

DEP issued a SIP-approved permit in 1994, which contained the following requirements for controlling odors:[239]

> g. ODOR CONTROL
>
> No air pollutants that cause or contribute to objectionable odors are allowed from this facility pursuant to Rule 62-296.320(2), F.A.C. The truck access doors to the facility shall remain closed except during normal working shifts when garbage is being received near the garbage storage pit area to allow vehicle passage. To minimize odors at the facility, a negative pressure shall be maintained on the garbage tipping floor and air from within the garbage building will be used as the combustion air.

Not all these requirements appear in the Draft Title V Permit. Therefore, the following provisions from the SIP permit must be included in the Title V Permit:

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[235] Fla. Admin. Code R. 62-210.200 (179) " 'Objectionable Odor' - Any odor present in the outdoor atmosphere which by itself or in combination with other odors, is or may be harmful or injurious to human health or welfare, which unreasonably interferes with the comfortable use and enjoyment of life or property, or which creates a nuisance. (180) 'Odor' - A sensation resulting from stimulation of the human olfactory organ."

[236] *Supra* note 88. *See* 40 C.F.R. § 52.520.

[237] Notably, Florida is not the only state with federally enforceable odor requirements. For example, the New York State Department of Environmental Conservation's Title V permit issued to the Covanta Hempstead Company includes Condition 28, prohibiting air pollution, which cites "Applicable Federal Requirement: 6 NYCRR 211.1," and includes Permit Provision "Item 28.1" which explicitly prohibits odors ("No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others.") New York State Department of Environmental Conservation, Title V Operating Permit, Permit No. 1-2820-01727/0028 at 20 (Expires July 12, 2021).

[238] Draft Permit Provision FW 2 at 4.

[239] FL DEP 1994 PSD Permit at 15.

- The truck access doors to the facility shall remain closed except during normal working shifts when the garbage is being received near the garbage storage pit area to allow vehicle passage;
- To minimize odors at the facility, a negative pressure shall be maintained on the garbage tipping floor; and
- Air from within the garbage building will be used as combustion air.

Additionally, the permit applicant must supplement its application with information explaining and demonstrating that these permit conditions will be met. Finally, the Title V Permit must include sufficient monitoring, recordkeeping, and reporting to assure the permittee's operations are in compliance with these requirements.

D. The Draft Title V Permit Must Include Requirements and Compliance Conditions to Control Odor Emissions

EPA's Title V regulations, provides that the Title V permit "shall include… [e]mission limitations and standards, including those operational requirements and limitations that assure compliance with *all* applicable requirements at the time of permit issuance."[240] Title V permit conditions must also "assure[] compliance by the source with all applicable requirements."[241]

The Draft Title V Permit lacks provisions to control odors and to demonstrate compliance with the odor regulations. While the Draft Title V Permit prohibits "objectionable odors" and defines such odors, it lacks related compliance conditions related to "objectionable odors."[242] Without monitoring and recording keeping requirements, the Draft Title V Permit fails to assure compliance.

Moreover, because there is no emissions standard associated with the SIP odor requirement and no emissions data, the permitting agency must set the requirements based on design, equipment, work practice, operational standards, or a combination thereof to satisfy the odor requirements. DEP must first determine where the odors are coming from and then set requirements to control the odors. Lacking any work practice standards—and recordkeeping and reporting regarding those standards—the public and EPA have no means to enforce the SIP odor requirements.

E. The Draft Permit Lacks Monitoring and Enforcement Requirements to Assure Compliance with the SIP Odor Regulation

The Clean Air Act and the Title V regulations require that Title V permits include monitoring and reporting sufficient to assure compliance with the applicable requirements.[243] Applicable requirements must include sufficient monitoring and recordkeeping to assure compliance with the requirement even where the requirement itself lacks monitoring and recordkeeping.[244]

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[240] 40 C.F.R. § 70.6(a)(1) (emphasis added).
[241] 40 C.F.R. § 70.1(b).
[242] Fla. Admin. Code R. 62.210-200(179) (definition of objectionable odor),
[243] 42 U.S.C. § 7661c(c).
[244] 40 CFR §§ 70.6(a)(1), (a)(3)(i)(B), and (c)(1).

There is no periodic monitoring in the underlying applicable requirement for Permit Condition FW2. In a similar circumstance, EPA has stated:

> The lack of any periodic monitoring for this condition is in clear conflict with the requirement of 40 C.F.R. § 70.6(a)(3) that each permit shall contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit where the applicable requirement does not require periodic testing or monitoring.[245]

While "there may be limited cases" in which "the status quo (i.e., no instrumental monitoring) could meet the requirements of 40 C.F.R. § 70.6(a)(3)," the permitting authority must establish that regular monitoring would not significantly enhance compliance.[246] DEP has provided no basis for its decision that no periodic monitoring for odors is appropriate.

Therefore, despite Florida's odor regulations lacking any monitoring and recordkeeping requirements, the Title V Permit must specify the methodology for demonstrating compliance with the SIP odor regulations.[247] The City of Doral has at times had difficulty determining the source of odor complaints, due to the proximity of the Medley Landfill and other potential sources, and as a result, recommended monitoring upwind and downwind from the Covanta facility to determine if it was the source of these odors.[248] It is clear that monitoring is necessary to make the odor regulations and permit conditions enforceable.

Moreover, DEP cannot rely on the Facility Description for compliance purposes. The Facility Description explains that:

> Odors are minimized by: keeping the truck access doors closed during non-use; maintaining a negative pressure within the garbage tipping floor building; and, using the collected air from the garbage tipping floor building as combustion air for the MWC.[249]

This language is merely a description of operations, and in general, vague descriptions of work practices are neither practically enforceable nor enforceable permit conditions. This language appears in the general description of the permit and is not enforceable. Additionally, given the vague language in this sentence, it is not enforceable as a practical matter.

F. The Title V Permit Must Contain an Enforceable Compliance Schedule to Bring Covanta Into Compliance with the Applicable Odor Regulations

The Covanta Incinerator is not in compliance with applicable odor regulation requirements.[250] Federal regulations at 40 C.F.R. § 70.1(b) require that "[a]ll sources ... have a permit to operate that assures compliance by the source with all applicable requirements" and 40 C.F.R. § 70.7(a)(1)(iv) states that "a permit ... may be issued only if ... the conditions of the permit provide for compliance with all applicable requirements." In particular, "[s]uch a

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[245] *In the Matter of Fort James Camas Mill*, Order on Petition No. X-1991-1, (Dec. 22, 2000), at 14-15.
[246] *Id.* at 15.
[247] *See e.g. In the Matter of United States Steel Corporation, Granite City Works*, Petition No. V-2009-03 (Jan. 31, 2011), at 8-9.
[248] Odor Monitoring Evaluation Report at 12.
[249] Draft Permit at 2.
[250] As discussed elsewhere in these comments, as the Convanta Incinerator lacks adequate monitoring methods, the source may also be out of compliance with other requirements.

schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements."[251] Therefore, if this permit renewal is granted, it must include a compliance schedule.[252]

Additionally, the permit must include "[a] schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation."[253] Specifically, the numerous and continuous complaints filed with the City of Doral clearly show that the facility has not met—and is not able to meet—the odor regulation requirements. As discussed above, the public has reoccurring complaints which remain unaddressed by DEP and the Draft Title V Permit. The ongoing complaints clearly necessitate inclusion of a compliance schedule in the permit to bring the facility back into compliance.

G. DEP Must Require the Permit Applicant to Assess and Control All Sources of Odor Emissions

DEP's Draft Title V Permit omits an entire category of emitting units: those that are responsible for "secondary emissions." Examples of secondary emissions include emissions from materials loaded into and out of the truck; emissions from the materials themselves (transported in open air trucks); emissions from the diesel truck engines, which may remain idle for periods of time in the open building bays; and at the facility, odors released from vents and other fugitive sources. To control odors, it is necessary to include work practice standards regarding truck hygiene and require that trucks are enclosed.

Furthermore, DEP provides no analysis and includes no provisions in the Draft Title V Permit requiring the facility to use negative air mechanisms, scrubbants or other methods to limit or reduce odors—conditions that should be required given the facility's track record of objectionable odors, which are prohibited by DEP's regulations.[254]

H. To Respond to Complaints, the Title V Permit Must Contain Provisions for Root Cause Analysis and Resolution

The permit should require that the permit applicant conduct a root cause analysis when odor complaints are made. Such complaints should be resolved within a short amount of time (*e.g.*, three days). The permit applicant must be required to document how release of odors offsite occurred and was resolved including the equipment, chemicals, and work practice standards that hindered odor control. DEP must provide for transparency and accountability in the permit. Monitoring and recordkeeping information must be required in the permit and reported to the DEP on a quarterly basis. DEP must upload the reports promptly to its online electronic files as well as to an accessible, easy-to-use database (as described in Section VII above), so that the public has full access. Furthermore, all complaints regarding odors received

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[251] 40 C.F.R. § 70.5(c)(8)(iii)(C).
[252] *Id*.
[253] 40 C.F.R. § 70.5(c)(8)(iv).
[254] Fla. Admin. Code R. 62-296.320(2) (Objectionable Odor Prohibited); Fla. Admin. Code R. 62-210.200 (179) (definition of "Objectionable Odor"); Fla. Admin. Code R. 62-210.200 (180) (definition of 'Odor'); *see also* 79 Fed. Reg. 28,607 (May 19, 2014), https://www.epa.gov/sips-fl/epa-approved-statutes-and-regulations-florida-sip; 64 Fed. Reg. 32,346 (June 16, 1999), https://www.epa.gov/sips-fl/epa-approved-statutes-and-regulations-florida-sip.

by the either the City of Doral, Miami-Dade County, or DEP should be communicated to the facility for response, with the permitting and/or inspection agency responding to the individual filing the complaint regarding the resolution.

IX. THE PERMIT APPLICANT IS NOT ENTITLED TO A PERMIT SHIELD

Section 504(f) of the Act allows permit shields in Title V permits and authorizes the permitting authority to provide that compliance with the permit be deemed compliance with all other applicable provisions of the Act. This determination can only be made if the applicable requirements of such provisions are included in the permit, or if the permitting authority, in acting on the permit, determines that such other provisions (which shall be referred to in such determinations) are not applicable.[255] The permitting authority's determination regarding the shield or a concise summary thereof must be included in the permit.[256]

The permit applicant lists the permit shield provisions as applicable requirements. Yet, DEP's discussion in its Statement of Basis does not respond to the applicant's request for the permit shield and the Draft Title V Permit fails to include a permit shield. Contrary to the public notice and comment requirements, DEP cannot add a permit shield to its final action. Moreover, as demonstrated in these comments, the permit applicant is not entitled to a permit shield from several requirements, including the PSD permitting requirements that DEP erroneously removed and the ongoing violations of the Odor Regulations and permit conditions.

X. THE DRAFT PERMIT FAILS TO INCLUDE THE REQUIRED PROVISIONS, INCLUDING THAT ANY CREDIBLE EVIDENCE MAY DEMONSTRATE PERMIT NONCOMPLIANCE

The Draft Title V Permit fails to include required provisions. For example, EPA's Part 70 regulations require that each permit issued under Part 70 must include specific provisions, including that"

> The permittee must comply with all conditions of the part 70 permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; *or for denial of a permit renewal application.*[257]

DEP's Draft Title V Permit fails to contain these Provisions.[258] DEP must revise the Draft Title V Permit to include these required provisions.

Additionally, the Draft Title V Permit fails to include the requirement for use of any credible evidence to demonstrate noncompliance with any term of the permit.[259] Various sections of the Draft Title V Permit provide that compliance is determined using specific

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[255] *See* 42 U.S.C. § 7661c(f); *see also* 57 Fed. Reg. 32,250, 32,255, 32,277 (July 21, 1992).
[256] *Id.*
[257] 40 C.F.R. § 70.6(a)(6)(i) (emphasis added).
[258] DEP's previously issued Title V also fails to include these provisions; see Permit No. 0250348-012-AV (Issued April 4, 2017).
[259] 40 C.F.R. § 51.212 requires SIPs and applicable requirements in SIP-issued permits to exclude any provision that would prevent the use of credible evidence of noncompliance.

method(s),[260] which makes it possible for the permit applicant to assert that the methods for demonstrating compliance specified in the permit are the only methods admissible to demonstrate a violation of the permit terms. To make clear the authority to use other evidence to prove compliance or noncompliance, DEP must remove this language. In addition to removing "credible evidence buster" language, consistent with EPA's regulations, DEP must include language providing for use of other credible evidence.[261]

As an emitter of greenhouse gas emissions (GHG) the source is subject to emission reporting requirements.[262] Here, DEP's Statement of Basis fails to disclose the actual GHG emissions as required by 40 C.F.R § 98, Subpart C Table C-1, which is an applicable requirement. Furthermore, the Draft Title V Permit fails to include these regulatory requirements. DEP must include the GHG reporting requirements in the permit.

XI. THE DRAFT PERMIT IS INCONSISTENT WITH OPERATING PERMITS ISSUED FOR OTHER SIMILAR SOURCES

Incinerators permitted by other states include emission sources neither identified nor controlled by the Draft Title V Permit for this source. For example, the Long Beach, California SERRF Operations permit includes operating permit conditions for the Wastewater Treatment System.[263] The Draft Title V Permit for this source fails to include such a system. DEP must explain the apparent discrepancies between the two operating permits, and where necessary, include such permit conditions and terms.

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[260] *See, e.g.*, the following draft permit conditions: "FW9. Semi-Annual Reports. The permittee shall monitor compliance with the terms and conditions of this permit;" "A8.c The carbon injection rate must be estimated and maintained in compliance with requirements set forth in 40 CFR 60.58b(m);" "A.24. Continuous Steam Flow Monitoring System. The owner or operator shall calibrate, maintain, and operate a steam flow meter or a feedwater flow meter; measure steam flow in lb/hour on a continuous basis; and record the output of the monitor to determine compliance with the load level requirements under A.3;" "A.25 To determine compliance with the maximum PM control device temperature requirements under Specific Condition A.4, the permittee shall calibrate, maintain and operate a device for measuring on a continuous basis the temperature of the flue gas stream at the inlet to each PM control device used by each emissions unit."

[261] 40 C.F.R. § 51.212(c); *see also*, Letter from Stephen Rothblatt, Acting Director, Air and Radiation Division, EPA Region 5, to Paul Dubenetzky, Branch Chief Office of Air Management Indiana Department of Environmental Management at 3-4 (July 28, 1998), https://www.epa.gov/sites/default/files/2015-08/documents/ce_ind.pdf (Attachment 57).

[262] This source "must report GHG emissions under this subpart if your facility contains one or more stationary fuel combustion sources and the facility meets the applicability requirements of either §§ 98.2(a)(1), 98.2(a)(2), or 98.2(a)(3)." 40 C.F.R. § 98.31. Out of the six GHG pollutants—Carbon dioxide; $C0_2$; Methane: CH_4; Nitrous oxide, N_20; Hydrofluorocarbons, HFCs; Perfluorocarbons, PFCs; Sulfur hexafluoride, SF6—only the first three are emitted by combustion sources.

[263] South Coast Air Quality Management District, Facility Permit to Operate issued to Long Beach City, SERRF Project (Issued March 1, 2017) (Attachment 58); *see also* Oregon Department of Environmental Quality, Oregon Title V Operating Permit, Covanta Marion, Inc., Permit number: 24-5398-TV-01 at 21, Permit Condition 55 (Expiration date: Sept. 1. 2025) (where there are additional permit conditions that are not seen in DEP's draft Title V permit); *see also* Oregon Department of Environmental Quality, Permit Review Report for Oregon Title V Operating Permit, Covanta Marion, Inc., Permit number: 24-5398-TV-01 (Attachment 59)

XII. PERMIT CONDITIONS THAT ALLOW FOR DEPARTMENT DISCRETION ARE NOT PRACTICALLY ENFORCEABLE

Title V permit conditions must be written with enough specificity to assure that the permit applicant, the public, and regulatory authorities know what requirements apply.[264] EPA has explained that:

> A permit is enforceable as a practical matter (or practically enforceable) if permit conditions establish a clear legal obligation for the source [and] allow compliance to be verified. Providing the source with clear information goes beyond identifying the applicable requirement. It is also important that permit conditions be unambiguous and do not contain language which may intentionally or unintentionally prevent enforcement.[265]

Permit provisions that purport to give DEP the authority to revise permit terms outside the permit issuance process violate this requirement. Such provisions, known generally as "director discretion" provisions, result in citizens being unable to enforce permit conditions because they lack access to Department determinations made outside the permit process and without public comment. Furthermore, citizens would have difficulty disputing the validity of an alternate requirement established by the Department where the source had met the requirements of that condition. Finally, such Department discretion allows the source to negotiate a permit condition "off permit" and bypass the permitting process requirements and procedures.

Here, there are numerous provisions in the draft permit that provide DEP with authority to change permit provisions outside the public notice and comment process, and are not practically enforceable. For example, the Draft Permit:

- Contains a list of test methods that must be used, but then provides broad authority to the Department to change a method;[266]
- Allows the Department to approve burning of fuels or wastes not specified in the permit;[267]
- Provides the Department with broad authority to approve waste materials generated by manufacturing, industrial or agricultural activities.[268]

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[264] *See* 40 C.F.R. § 70.6.

[265] *In the Matter of Midwest Generation, LLC Fisk Generating Station*, Order on Petition No. V-2004-1 (March 25, 2005), at 12 (brackets in original).

[266] Draft Permit Provision A.33. "No other methods may be used unless prior written approval is received from the Department."

[267] Draft Permit Provision A.7 "Methods of Operation - Fuels. a. *Authorized Fuels.* (1) Fuels allowed to be burned in each MWC include RDF, with natural gas or propane as auxiliary startup and stabilization fuels. Other fuels or wastes, not specifically listed herein, shall not be burned without prior written approval from the Department."

[268] Draft Permit Provision A.7. g. "*Other Solid Waste/Segregated Loads*. Subject to the conditions and limitations contained in this permit, the following other solid waste materials may be used as fuel at the facility (i.e. the following are authorized fuels that are non-MSW material). The total quantity of the following non-MSW material received as segregated loads and burned at the facility shall not exceed 5%, by weight, of the facility's total fuel. Compliance with this limitation shall be determined as a daily average on a calendar monthly basis. . . .
(8) Waste materials generated by manufacturing, industrial or agricultural activities, provided that these items or materials are substantially similar to items or materials that are found routinely in MSW, subject to prior approval of the Department."

- Provides the Department with unlimited authority to approve excess emissions beyond the three hours in any 24-hour period.[269]
- Provides the Department with unlimited authority to approve excess emissions resulting from startup, shutdown, or malfunction beyond the two hours in a 24-hour period.[270]
- Lacks evidence that the alternate sampling protocol was approved by EPA as part of Florida's SIP.[271]
- Provides the Department with unlimited authority to approve excess emissions resulting from startup, shutdown or malfunction of any emissions unit that exceeds the two hours in any 24-hour period.[272, 273, 274, 275]

Therefore, the Draft Title V Permit is insufficient and fails to provide for the public's ability to determine the applicability of requirements that will be established outside the Title V permit process. Thus, DEP has limited the ability for public participation as required by 40 C.F.R. § 70.7(h).

XIII. THE PERMIT RENEWAL MUST BE DENIED BECAUSE THE PERMIT APPLICATION IS INCOMPLETE

DEP must deny the permit because the permit application is incomplete and inadequate in violation of 40 C.F.R. § 70.7(a)(1)(i), which states that "[a] permit ... may be issued only if ...

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[269] Draft Permit Provision A.21. "Excess Emissions Allowed. a. Excess emissions resulting from malfunction shall be permitted provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized. In no case shall the duration of excess emissions exceed three hours in any 24 hour period unless specifically authorized by the Department for longer duration."

[270] Draft Permit Provision A.22. **"**Allowed Excess Emissions resulting from Warm-up, Startup, Shutdown, or Malfunction. a. Excess emissions resulting from startup, shutdown, or malfunction shall be permitted provided best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized but in no case exceed two hours in a 24-hour period unless specifically authorized by the Department for longer duration."

[271] Draft Permit Condition A.33. "Per the Alternate Sampling Procedure (ASP No. 15-O-AP) approved by the Department on April 30, 2015, the permittee may conduct Method 26 testing for hydrogen chloride substituting large impingers in lieu of midget impingers and substituting a large empty chilled impinger for two midget impingers containing a NaOH solution. The Department's approval is attached as Appendix ASP."

[272] Draft Permit Condition B.3. **"**Excess Emissions Allowed. Excess emissions resulting from startup, shutdown or malfunction of any emissions unit shall be permitted provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized but in no case exceed two hours in any 24 hour period unless specifically authorized by the Department for longer duration. [Rule 62-210.700(1), F.A.C. and Permit No. 0250348-011-AC (PSD-FL-006G), Specific Condition B.3.]"

[273] Draft Permit Condition C.5. "Excess Emissions Allowed. Excess emissions resulting from startup, shutdown or malfunction of any emissions unit shall be permitted provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized but in no case exceed two hours in any 24 hour period unless specifically authorized by the Department for longer duration. [Rule 62-210.700(1), F.A.C.]"

[274] Draft Permit Condition D.3. **"**Excess Emissions Allowed. Excess emissions resulting from startup, shutdown or malfunction of any emissions unit shall be permitted provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized but in no case exceed two hours in any 24 hour period unless specifically authorized by the Department for longer duration. [Rule 62-210.700(1), F.A.C.]"

[275] Draft Permit Condition E.3. "Excess Emissions Allowed. Excess emissions resulting from startup, shutdown or malfunction of any emissions unit shall be permitted provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized but in no case exceed two hours in any 24 hour period unless specifically authorized by the Department for longer duration. [Rule 62-210.700(1), F.A.C.]"

[t]he permitting authority has received a complete permit application for a permit." Indeed, "[a] demonstrated willingness and ability to comply with basic agency application procedures is the *sine qua non* of any successful permit application."[276] Not only does the permit applicant have an obligation to submit a complete application, DEP must *not* issue a permit that is not supported by a complete application.

Here, the application is incomplete because it fails to include:

- All applicable requirements from the PSD permits;
- Statements of methods for determining the source's current compliance status with each of the federally enforceable requirements;
- GHG emissions and the related reporting requirements;
- Measure to address ongoing odor complaints and noncompliance with the odor regulations; and
- Compliance and test methods capable of demonstrating continuous compliance.

Moreover, the submission of an incomplete permit application hinders the public's ability to participate in the permitting process. DEP's failure to require submittal of the information missing from the permit application further hinders public participation and meaningful comment. Because such information was not included in the permit application, the request for permit renewal must be denied. Now is not the time for the permit applicant to supplement or revise its application submission, particularly since it had nearly five years since the current Title V permit was issued to do so.

XIV. CONCLUSION

Because of the numerous, myriad legal flaws with Draft Title V Permit and the significant public concern over this incinerator—demonstrated by the complaints logged to the City's odor hotline, news articles published about the incinerator, and the community sign-on letters opposing the renewal of this Title V Permit—we respectfully request a public hearing in this matter.

Furthermore, for the reasons stated above, DEP cannot validly finalize the draft permit. To issue the permit as proposed would not only be unlawful under Florida's Title V regulations and its SIP, but contrary to the Clean Air Act and congressional purposes of the Title V and PSD permitting programs to:

- Provide members of the public with the information to protect local air quality by helping make sure that air pollution sources are following the law;
- Enhance compliance with all the applicable requirements that apply to the air pollution source; and
- Protect health and welfare.

[276] *In the Matter of: CECOS International, Inc.*, 3 E.A.D. 77, at *3 (Jan. 11, 1990).

Furthermore, consistent with Clean Air Act[277] and EPA's implementing regulations,[278] EPA explained in promulgating its final Title V regulations: "the permittee must comply with all conditions of the part 70 permit [and] [a]ny permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application."[279] The permit applicant's ongoing noncompliance with its current permit conditions and the applicable regulations justify permit denial. For example, the multitude of ongoing unresolved noxious odor complaints demonstrates the source's non-compliance with the federally-approved SIP regulations. Despite complaints and studies, the noxious odors continue.

Permit denial is necessary to protect human health and the environment of the adjacent environmental justice community because this permit applicant remains recalcitrant in complying with the regulations and submitting the requisite permit application to comply with applicable requirements.

Under 40 C.F.R. § 70.7(a)(5), the permitting authority, in acting on a permit application, must transmit to EPA a statement setting forth the legal and factual basis of its decision. For this permit application, DEP must deny the permit application and prepare a statement of the grounds for denial.[280]

We appreciate your consideration of these comments. All attachments referenced in this letter will be submitted to DEP under separate cover before the close of the comment period. Please do not hesitate to contact us with any questions.

Sincerely,

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[277] 42 U.S.C. § 7661b(c) ("The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), *and shall* issue *or deny the permit*, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program)." (emphasis added).

[278] 40 C.F.R. § 70.6(a)(6)(i) (Each permit issued under this part shall including the following elements…Provisions stating the following: "The permittee must comply with all conditions of the part 70 permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; *or for denial of a permit renewal application*." (emphasis added)); F.A.C. 62-213.430(2)(" Permit Denial. If the Department proposes to deny the permit application, the Department shall provide the applicant an explanation of the denial in accordance with subsection 62-4.070(6), F.A.C."); F.A.C. 62-4.070(6) ("The applicant shall be promptly notified if the Department intends to deny the application, and shall be informed of the reasons for the intended denial, and of the right to request an administrative hearing.").

[279] 57 Fed. Reg. 32,250, 32,304 (July 21, 1992).

[280] 57 Fed. Reg. 32,250, 32,280 (July 21, 1992).

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XV. LIST OF ATTACHMENTS[281]

- **Attachment 1** – Florida Rising et al., "Re: Comments and Request for Public Hearing on Draft Title V Permit No. 0250348-013-AV" ("Community Sign-on Letter") (Dec. 20, 2021)

- **Attachment 2** – City of Doral's 311 Odor Complaint Log (Jan. 1, 2016 to Sept. 8, 2021) (redacted) ("Odor Complaint Log")

- **Attachment 3** – Samantha Gross, *Doral mayor to county: Don't extend lease at odoriferous Covanta recycling plant*, Miami Herald (Aug. 26, 2021)

- **Attachment 4** – Tishman Environment and Design Center & Global Alliance for Incinerator Alternatives (GAIA*), The Cost of Burning Trash: Human and Ecological Impacts of Incineration in Florida* (2020)

- **Attachment 5** – Earthjustice et al, *New Jersey's Dirty Secret: The Injustice of Incinerators and Trash Energy in New Jersey's Frontline Communities* (2021)

- **Attachment 6** – Comments of New York State Department of Environmental Conservation, "Re: Matter of the Application of Covanta Energy Corporation for Inclusion of Energy from Waste Facilities as an Eligible Technology in the Main Tier of the Renewable Portfolio Standard Program" (Aug. 9, 2011)

- **Attachment 7** – Comments of Attorney General, Eric T. Schneiderman, "In the Matter of the Application of Covanta Energy Corporation for Modification of the List of Eligible Resources Included in the New York Main Tier of New York's Renewable Portfolio Standard Program to Include Energy From Waste (ETW) Technology" (Aug. 19, 2011)

- **Attachment 8** – Environmental Integrity Project, *Waste-To-Energy: Dirtying Maryland's Air by Seeking a Quick Fix on Renewable Energy?*(2011)

- **Attachment 9** – Neil Tangri, *Waste Incinerators Undermine Clean Energy Goals, Global Alliance for Incinerator Alternatives* (2021)

- **Attachment 10** – Ana Isabel Baptista & Adrienne Perovich, *U.S. Municipal Solid Waste Incinerators: An Industry in Decline*, TISHMAN ENV'T AND DESIGN CTR. (2019)

- **Attachment 11** – Global Alliance for Incinerator Alternatives (GAIA), *Pollution and Health Impacts of Waste-to-Energy Incineration* (2019)

- **Attachment 12** – National Research Council, *Waste Incineration and Public Health*, NAT'L ACADEMIES PRESS (2000)

[281] Submitted to DEP under separate cover via electronic mail.

- **Attachment 13** – Xiao Wu et al., *Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis*, 6 SCI. ADVANCES eabd4049 (2020)

- **Attachment 14** – Oregon Physicians for Social Responsibility et al., "Re: Covanta Marion, Inc's Proposed Title V Air Quality Permit Renewal," 24 (Nov. 18, 2019) ("Oregon PSR Comment Letter")

- **Attachment 15** – State of Oregon, Department of Environmental Quality, *2016 Air Toxics Emissions Inventory*, (air toxics emissions inventory for Covanta Marion, Inc requiring testing for HAPs) (2020)

- **Attachment 16** – American Lung Association, *State of the Air 2021*, (2021)

- **Attachment 17** – American Lung Association webpage, "Health Effects of Particle Pollution, Who is Most at Risk from Particle Pollution?"

- **Attachment 18** – EPA, EJSCREEN Report for three-mile radius surrounding the Covanta Incinerator (Dec. 16, 2021)

- **Attachment 19** – National Research Council Committee on Health Effects of Waste Incineration, *Waste Incineration and Public Health, Environmental Transport and Exposure Pathways of Substances Emitted from Incineration Facilities*, (2000)

- **Attachment 20** – Robert D. Bullard, Ph. D., et al, *Toxic Wastes and Race and Twenty 1987-2007*, (2007)

- **Attachment 21** – EPA, EJSCREEN image showing public and subsidized housing for a three-mile radius surrounding the Covanta Incinerator

- **Attachment 22** – Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. Times, (July 5, 2020)

- **Attachment 23a** – N.Y. Times, *Tracking Coronavirus in Florida: Latest Map and Case Count*, N.Y. Times (updated Dec. 15, 2021)

- **Attachment 23b** – Image from N.Y. Times Coronavirus database documenting 683,842 total coronavirus cases and total 9,208 coronavirus deaths in Miami-Dade County as of Dec. 15, 2021, higher than any other county in Florida.

- **Attachment 24** – *In Re: Dade County Application for Certificate of Resource Recovery Facility under the Provisions of the Florida Electrical Power Plant Siting Act*, No. 77-607, (Fla. Div. of Admin. Hearings Nov. 22, 1977) ("Administrative Order),

- **Attachment 25** – *In Re: Dade County Application for Certificate of Resource Recovery Facility under the Provisions of the Florida Electrical Power Plant Siting Act*, Case No.

77-607 (The Florida Governor and Cabinet Jan. 9, 1978) ("Governor's Order") (order adopting the Hearing Officer's Administrative Order, which recommended certification of the proposed site subject to certain conditions)

- **Attachment 26** – EPA's Letter to U.S. Dept. of Housing and Urban Development (HUD) Re: Ajax Asphalt Plant draft Permit to Install (Sept. 16, 2021)

- **Attachment 27** – HUD, Comment Letter to EPA Re: Ajax Asphalt Plant, Flint, Michigan (Sept. 22, 2021)

- **Attachment 28** – EPA News Release, citing "Administrator Michael Regan, Remarks for White House Environmental Justice Advisory Council (WHEJAC) First Public Meeting, As Prepared for Delivery," (March 30, 2021)

- **Attachment 29** – EPA News Release, "EPA Uses Emergency Powers to Protect St. Croix Communities and Orders Limetree Bay Refinery to Pause Operations," (May 14, 2021)

- **Attachment 30** – Clean Air Act Emergency Order, *In the matter of Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC*, No. CAA-02-2021-1003, (EPA Region 2 May 14, 2021)

- **Attachment 31** – U.S. DOJ Press Release, "United States Files Complaint and Reaches Agreement on Stipulation with Limetree Bay Terminals LLC and Limetree Bay Refining LLC Relating to Petroleum Refinery in St. Croix, U.S. Virgin Islands," (July 12, 2021)

- **Attachment 32** – Joint Stipulation, *U.S. v. Limetree Bay Refining, LLC et al*., Civ. A. No. 1:21-cv-00264 (D.V.I. July 12, 2021)

- **Attachment 33** – Letter from Dore LaPosta, Director, Enforcement and Compliance Assurance Division, EPA Region 2, to Jeffrey Hersperger, Senior Vice President, Limetree Bay Terminals, LLC, "Request to Provide Information Pursuant to the Clean Air Act, Reference Number: CAA-02-2021-1462," (July 12, 2021)

- **Attachment 34** – State of Oregon Press Release, "DEQ enforcement finds Owens-Brockway $1 mllion and requires facility to control pollution," (June 3, 2021)

- **Attachment 35** – Mutual Agreement and Final Order, *In the Matter of Owens-Brockway Glass Container Inc*., No. AQ/V-NWR-2020-208, (Ore. Envtl. Quality Comm'n. Oct. 22, 2021)

- **Attachment 36** – Oregon Department of Environmental Quality webpage, "Supplemental Environmental Projects"

- **Attachment 37** – Letter from Jonathan Stanton, Director, Environmental Health Services, Jefferson County Department of Health, to Tiger Lambert and Freddie Revis, et

al, Bluestone Coke, Letter Denying Operating Permit for Bluestone Coke, LLC (Aug. 11, 2011)

- **Attachment 38** – Complaint, *Jefferson Cty Bd. of Health v. Bluestone Coke, LLC*, No. 01-CV-2021902311.00 (Jefferson Cty, Ala. Aug. 11, 2021)

- **Attachment 39** – Southern Environmental Law Center Press Release, "Bluestone Coke shuts down, providing relief for surrounding communities," (Dec, 7, 2021)

- **Attachment 40** – Richard Gragg et al., *The Location and Community Demographics of Targeted Environmental Hazardous Sites in Florida*, 12 Fla. State Univ. J. Land Use & Envtl. Law: Vol. 1 (1996)

- **Attachment 41** – Chapter 98-304, Committee Substitute for House Bill 945

- **Attachment 42** – FL DEP webpage, Office of the Secretary, Shawn Hamilton, Interim Secretary

- **Attachment 43** – EPA News Release, "EPA Administrator Announces Agency Actions to Advance Environmental Justice: Administrator Regan Directs Agency to Take Steps to Better Serve Historically Marginalized Communities" (April 7, 2021)

- **Attachment 44** – EPA, *Guidance on Regional Haze State Implementation Plans for the Second Implementation Period*, 33 (2019)

- **Attachment 45** – EPA webpage, "Learn About Environmental Justice"

- **Attachment 46** – Letter from John Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO ("Seitz 1999 Memo") (May 20, 1999)

- **Attachment 47** – FL DEP Technical Evaluation and Preliminary Determination, Project No. 0250348-011-AC (PSD-FL-006G) Application for Minor Source Air Construction Permit Updated Air Construction Permit (Feb. 2012) ("FL DEP Technical Evaluation")

- **Attachment 48** – FL DEP Air Permit No. 0250348-011-AC (PSD-FL-006G) (April 27, 2012)

- **Attachment 49** – FL DEP Air Permit No. PSD-FL-006A (Dec. 16, 1994)

- **Attachment 50** – FL Department of Environmental Regulation (DER) Air Construction Permit No. SC 13-2691 (Aug. 4, 1977, revised Sept. 20, 1977)

- **Attachment 51** – Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, "White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program," (Mar. 5, 1996)

- **Attachment 52** – Miami Dade-County Resources Recovery Facility PSD Permit, PSD-FL-006 (Jan. 1977)

- **Attachment 53** – *In re Indeck-Elwood, LLC*, PSD Appeal 03-04, 13 E.A.D. 126, 171-81 (E.A.B. 2006)

- **Attachment 54** – Oregon Department of Environmental Quality, Oregon Title V Operating Permit, Covanta Marion, Inc., Permit number: 24-5398-TV-01 (Expiration date: Sept. 1. 2025)

- **Attachment 55** – Odor Monitoring Evaluation Report, City of Doral, Florida (Feb. 7, 2014) ("Odor Monitroing Evaluation Report")

- **Attachment 56** – William H. Clements' (Covanta employee's) emails responding to 311 Odor Hotline complaints, received from the City of Doral in response to a public records request

- **Attachment 57** – Letter from Stephen Rothblatt, Acting Director, Air and Radiation Division, EPA Region 5, to Paul Dubenetzky, Branch Chief Office of Air Management Indiana Department of Environmental Management (July 28, 1998)

- **Attachment 58** – South Coast Air Quality Management District, Facility Permit to Operate issued to Long Beach City, SERRF Project (Issued March 1, 2017)

- **Attachment 59** – Oregon Department of Environmental Quality, Permit Review Report for Oregon Title V Operating Permit, Covanta Marion, Inc., Permit number: 24-5398-TV-01