BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Proposed Operating Permit for

ONYX ENVIRONMENTAL SERVICES to operate
A toxic waste incinerator in Sauget, Illinois

I.D. No. 163121AAP
Application No. 95090072

Proposed by the Illinois Environmental Protection Agency

PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE ONYX TOXIC WASTE INCINERATOR

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Pursuant to Clean Air Act § 505(b)(2), 40 C.F.R. § 70.8(d), and Executive Order 12898, (Federal Actions To Address Environmental Justice In Minority and Low-Income Populations), American Bottom Conservancy, Health and Environmental Justice – St. Louis, Lake County Conservation Alliance and Sierra Club ("Petitioners") hereby petition the Administrator of the United States Environmental Protection Agency ("U.S. EPA") to object to the proposed Title V Operating Permit for the Onyx toxic waste incinerator in Sauget, Illinois. The Illinois Environmental Protection Agency ("IEPA") submitted the proposed permit to U.S. EPA on November 6, 2003. The petitioning organizations provided comments to the Illinois Environmental Protection Agency on the draft permit and testified at the public hearing. A copy of those comments is attached. This petition is filed within sixty days following the end of U.S. EPA's 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed.

Based on the significant environmental justice issues raised in this matter, Petitioners also request that the Administrator exercise his discretion under the Resource Conservation and Recovery Act ("RCRA") to object to (or otherwise act to block) Illinois issuing the state portion of Onyx's proposed RCRA permit and, at the same time, deny Onyx the federal portion of the proposed RCRA permit.[1] We recognize that this is a significant and unusual request. But it is a request based on Onyx's 12-year track record of explosions and other serious violations that demonstrate gross recklessness, and/or an unwillingness and inability to comply with clean air and RCRA safeguards. It is a request grounded in the fact that those at greatest risk from Onyx's clouds of toxic gases are disproportionately the low-income and minority residents of the East St. Louis area. Finally, it is a request targeting U.S. EPA's authority, indeed its obligation, to exercise its powers to provide clean air and safe communities for all Americans. In short, Petitioners request U.S. EPA object to Onyx's proposed Title V permit and deny Onyx the RCRA permits it needs to continue operating and threatening the surrounding community. In addition, based on Onyx's ongoing unwillingness and/or inability to comply with basic clean air and hazardous waste management requirements Petitioners also urge U.S. EPA to bar Onyx from accepting off-site CERCLA (Superfund) waste.

I. THE PROPOSED ONYX PERMITS AND THE PROCESS LEADING UP TO THEIR ISSUANCE VIOLATES THE AGENCY'S COMMITMENTS AND OBLIGATIONS TO ADDRESS ENVIRONMENTAL JUSTICE ISSUES.

1. Onyx Is Located In an Environmental Justice Area

Onyx's toxic waste incinerator is located in Sauget, Illinois. Sauget is a part of the Metro East portion of the Greater St. Louis metropolitan area. Immediately adjacent to Sauget are the Cities of East St. Louis and Cahokia. These surrounding communities are environmental justice areas.

[1] Petitioners are forced to address the interrelated Title V and RCRA issues in a single petition because neither U.S. EPA nor IEPA has responded to any of the written or oral comments the agencies received from the public on either draft permit.

In addition, Onyx operations generate significant truck and rail traffic containing hazardous wastes through these same low-income and minority communities. According to U.S. EPA data,

- Approximately 68 percent of the 62,892 residents living within three miles of the Onyx toxic waste incinerator are minority residents.[2]
- The number of residents living below the poverty level range between 24 percent in Cahokia and Madison to 48 percent in Brooklyn. In East St. Louis the population is 97.7 percent African-American, with a median income of $11,990 and a poverty rate exceeding 44 percent.

East St. Louis has been described as the "most distressed small city in America."

2. Granting Onyx permits to continue to operate its toxic waste incinerator is an environmental justice issue.

Onyx's toxic waste incinerator receives and burns hazardous waste from around the world. This waste includes the most dangerous chemicals known to science and in the process of handling and burning this waste those dangerous chemicals are released and spread over the neighboring communities.

According to the Environmental Defense Scorecard, Onyx's 2000 Toxic Release Inventory for releases into the air (in pounds) around its facility, sorted by health effects of those releases, are as follows:

- Recognized Carcinogens 214
- Suspected Carcinogens 519
- Suspected Cardiovascular or Blood Toxicants 1,279
- Recognized Developmental Toxicants 230
- Suspected Developmental Toxicants 990
- Suspected Endocrine Toxicants 167
- Suspected Immunotoxicants 312
- Suspected Kidney Toxicants 768
- Suspected Gastrointestinal or Liver Toxicants 12,133
- Suspected Musculoskeletal Toxicants 650
- Suspected Neurotoxicants 1,575
- Recognized Reproductive Toxicants 43
- Suspected Reproductive Toxicants 819

[2] http://www.epa.gov/cgi-bin/get1cReport.cgi?tool=echo&IDNumber=ILD098642424&media_tool=ECHO

- Suspected Respiratory Toxicants 12,913
- Suspected Skin or Sense Organ Toxicants 12,150

3. Onyx Has One of The Worst Compliance Records In Illinois And It Is Surrounded By Other Facilities That Are Also Unable to Comply With Clean Air Safeguards.

This toxic waste incinerator has a long history of federal and state prosecutions for violations of state and federal laws. In 1990, the state prosecuted the incinerator for multiple air and waste law violations and lodged a decree in state court. In 1991, after the facility violated its 1990 agreement, the State Attorney General again commenced an enforcement action, this time settling for a $3.3 million penalty and another court order. In 1991 US EPA also imposed a fine of $3,380 for the illegal shipment of hazardous wastes from Bermuda. Earlier this year, Attorney General Lisa Madigan prosecuted the incinerator for more violations between 1996 and February 1998, including an explosion that rocked the facility and released clouds of poisonous gases, hospitalized a worker, and secured a $500,000 penalty. Despite these prior prosecutions there are, according to the Illinois Attorney General, two more enforcement cases currently pending

According to the U.S. EPA ECHO database, there are another six major sources of air pollution just in Sauget alone. Currently half are listed as being in significant noncompliance with their clean air permits.

II. U.S. EPA HAS THE AUTHORITY TO OBJECT TO THE PROPOSED TITLE V PERMIT AND BLOCK ISSUANCE OF ANY OTHER PERMITS ON THE BASIS THAT THIS FACILITY PRESENTS AN UNREASONABLE THREAT OF HARM AND THAT THREAT IS DISPROPORTIONATELY BORNE BY LOW-INCOME AND MINORITY RESIDENTS.

U.S. EPA (and IEPA) have an unambiguous directive to consider environmental justice implications in their permitting decisions.[3] In this instance E.O. 12898, the CAA and RCRA provide U.S. EPA with broad statutory authority to consider such environmental justice issues and establish permit limits to avoid disparate impacts on low-income and minority communities. Former Administrator Whitman underscored U.S. EPA responsibilities in an August 9, 2001 memo, "EPA's Commitment to Environmental Justice."

1. The Resource Conservation & Recovery Act (RCRA)

On December 1, 2000 then-U.S. EPA General Counsel Gary Guzy wrote a memorandum outlining the scope of EPA's authority to address environmental justice issues in its

[3] Federal Executive Order 12898: http://www.epa.gov/civilrights/eo12898.htm and IEPA Interim EJ Policy: http://www.epa.state.il.us/environmental-justice/policy.html.

RCRA permitting decisions. (Guzy Memo). The Guzy Memo focuses on RCRA's Omnibus Provision, Section 3005(c)(3), which provides that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) deems necessary to protect human health and the environment." Guzy Memo at 2.[4] The Guzy Memo describes how U.S. EPA's authority to address environmental justice issues in RCRA hazardous waste permits had been directly addressed by the Environmental Appeals Board (EAB) in *Chemical Waste Management, Inc.*, 6 E.A.D. 66, 1995 WL 395962 (1995).[5] As Mr. Guzy stated:

> The Board found "that when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process." Id. at 73. It also found that RCRA allows the Agency to "tak[e] a more refined look at its health and environmental impacts assessment in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations." Id. at 74. Such a close evaluation could, in turn, justify permit conditions or denials based on disproportionately high and adverse human health or environmental effects, while "a broad analysis might mask the effects of the facility on a disparately affected minority or low-income segment of the community." Id.

Guzy Memo at 1 (emphasis added). As described above, there is no dispute that the operation of Onyx's incinerator, including the transport of hazardous waste to and from the facility "may have a disproportionate impact on a minority or low-income segment of the affected community [of Metro East]."

In a situation where a company has a longstanding pattern of noncompliance with RCRA safeguards and is threatening human health and the environment, U.S. EPA has the authority and indeed the duty to close down this facility. This RCRA Omnibus provision, Guzy offers, has been interpreted by U.S. EPA "to authorize denial of a permit to a facility if EPA determines that operation of the facility would pose an unacceptable risk to human health and the environment and that there are no additional permit terms or conditions that would address such risk." Guzy Memo at 3 (emphasis added). Such denial would be appropriate, Guzy opined:

> to address the following health concerns in connection with hazardous waste management facilities that may affect low-income communities or minority communities:

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[4] There are other additional sources of authority for U.S. EPA to consider environmental justice issues in its permitting decision, including section 3013 (authority to compel studies to assist with establishing appropriate permit limits); and Section 3005(e).

[5] www.epa.gov/eab/disk11/cwmii.pdf

- Cumulative risks due to exposure from pollution sources in addition to the applicant facility;

- Unique exposure pathways (e.g. subsistence fishers, ...); and

- Sensitive populations (e.g. children with levels of lead in their blood, ...).

Guzy Memo at 3. Onyx's incinerator is located amidst a low-income and minority community that is suffering from all three such high-risk scenarios.

a. Cumulative Risks

As described above, Onyx emits the most persistent and toxic chemicals known to science. These chemicals, such as dioxin, mercury and lead, do not degrade and accumulate in the human body with increased exposure. Compounding Onyx's emissions, both legal and illegal, are the cumulative effects of more than a dozen other major sources of air pollution immediately adjacent to Onyx, including Monsanto, Solutia, and Big River Zinc. Each of these facilities emits millions of pounds of additional air pollution and the collective stew of all of these emissions is the air that residents of East St. Louis breathe every day.

In addition to risks posed by hazardous air pollutants, residents of East St. Louis also are bombarded with dangerous levels of fine particle and smog pollution. Based on three years of monitoring data, the State has proposed that this entire area be designated as nonattainment for PM2.5 and 8-hour ozone standards. The existing fine particle and smog problem is about to get a lot worse, absent U.S. EPA intervention.

Illinois and Missouri are moving quickly to permit giant new sources of fine particle and smog-forming pollution. For example, Missouri is pushing to approve the Holcim Cement plant just across the Mississippi River from East St. Louis. This largest-in-the-nation cement plant would dump over 3 tons of nitrogen oxides (a precursor to fine particles and smog pollution) per day into the region's already polluted air. Based on prevailing Southwest winds, much of that pollution is heading to East St. Louis.[6] Similarly, Illinois just released a draft permit for Peabody to build a giant coal-burning power plant in Washington County 1.8 miles south of the Greater St. Louis nonattainment area. Peabody's draft permit would allow 26,000 tons of criteria pollutants and 270 pounds of toxic mercury pollution every year. Again, this location is upwind of Metro East. A little further in the permitting pipeline is Illinois Power's plans to expand its notoriously dirty Baldwin plant. For unclear reasons, IEPA has to date

[6] To its credit, U.S. EPA is proposing to overrule Missouri's recommendation that the proposed Holcim site be located outside of the new 8-hour ozone nonattainment area. On the Illinois side, Region 5 has thus far remained silent on whether or not it will require that the counties where Peabody and Illinois Power seek to add their giant coal-burning power plants – Washington and Randolph – will be designated as nonattainment with respect to both the PM2.5 and 8-hour ozone standard. Nonattainment designations and the protections such designations provide (such as requiring pollution offsets) will have a direct impact on air quality in East St. Louis and therefore on the lives of the overwhelmingly low-income and minority residents.

declined to study the effects on PM2.5 and 8-hour ozone levels from building all of these new coal-burning power plants and a cement factory.

b. Unique Exposure Pathways Are Not Unique In East St. Louis.

Area residents are subject to "unique exposure pathways." Guzy Memo at 3. Lakes at both Frank Holten State Park in Centreville/East St. Louis and at Horseshoe Lake State Park in Granite City have fish consumption advisories because of high levels of mercury in the fish. The sediments in Horseshoe Lake have been found to contain high levels of both lead and cadmium. Many area minority and low-income residents fish both lakes for a major source of protein. For twenty years, Onyx has emitted large amounts of lead, cadmium and mercury into the region. The proposed permit allows large amounts of additional mercury, lead and cadmium pollution into the neighboring communities and waterways.

c. East St. Louis Is Home To a Large Number of "Sensitive Populations."

Onyx is located in the midst of an area with high numbers of "sensitive populations" already suffering from elevated levels of lead-poisoning and respiratory ailments, including asthma. Guzy Memo at 3. Sensitive populations include children, seniors, low-income and minority communities. Of the 210,234 people who live within five miles of the Onyx's incinerator, 66 percent are minority and 40 percent are elderly or children. As U.S. EPA has said, "[e]xposure to air pollution may trigger or cause adverse health effects and may explain why respiratory illness, such as asthma and bronchitis, particularly affect low-income communities and communities of color." See U.S. EPA Region 7, Asthma, Air Quality and Environmental Justice: EPA's Role in Asthma Education and Prevention.[7]

The other particularly sensitive subpopulation are children suffering from lead poisoning and/or asthma. Though national rates of childhood lead poisoning have declined to near 2%, childhood lead poisoning rates in the City of St. Louis have persisted at approximately 25% for the past decade, with rates in some neighborhoods nearing 55%. Research shows that exposure to airborne lead at levels of 1 microgram per cubic meter (ug/m^3) results in a blood lead level of 2-6 micrograms per deciliter (ug/dl) in exposed populations, underscoring the need to prevent airborne exposures. U.S. EPA has concluded that exposure to 1 ug/m^3 in the air results in 2 ug/dl lead in the blood, a ratio of 1:2. Other studies indicate the ratio is as high as 1:6. Airborne lead poses an unacceptable risk, particularly to pregnant women, their developing babies and to young children whose exposure to airborne lead is involuntary, causes irreversible damage, and cannot be controlled by individual actions and choices. It must stop at the stack.

Moreover, there are no additional permit conditions that can address the risk posed by Onyx's unwillingness and inability to comply with public health protections, even if the protections were sufficiently strong. Onyx has been given repeated warnings and

[7] Available at www.epa.gov/region07/programs/artd/air/quality/asthma.htm

opportunities to become a good neighbor. It has been slapped with multi-million dollar penalties. Yet, the violations continue and the surrounding residents (and the workers) continue to pay a very high price while Onyx continues in business. Under these extreme circumstances, U.S. EPA must deny the permit.

In fact, because U.S. EPA cannot include terms and conditions in Onyx's permit that will ensure the facility complies with health protections and no longer presents a threat to human health and the environment, RCRA 3005(c)(3) mandates U.S. EPA close this facility. If the facts in this case don't warrant permit denial, what would? If the agency fails to shut down this facility, it must explain to the people of Illinois the threshold that it determines warrants denying a permit and concluding that a company had relinquished its privilege to operate. On these facts, we believe it would be arbitrary and capricious to not deny Onyx its permits.

2. Clean Air Act

Petitioners recognize that Title V generally does not impose new substantive emission control requirements, but rather requires that all underlying applicable requirements be included in the operating permit. See *In re: Orange Recycling and Ethanol* (Adm'r, 2001). At least one applicable requirement is relevant in this instance.

In Illinois' SIP is a provision stating that "no person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with other sources, to cause or tend to cause air pollution in Illinois." 35 Ill. Admin. Code § 201.141. The term "air pollution" is further defined to mean "the presence in the atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 35 Ill. Admin. Code § 201.102. As described elsewhere in this petition, Onyx is seeking permission to discharge such contaminants as mercury, lead, and dioxin into the environment at levels that are injurious to human health and the environment.

There are other CAA authorities providing U.S. EPA with broad authority to fulfill its environmental justice mandates, such as provisions providing U.S. EPA with broad authority to research and disclose the human health effects of Onyx's toxic emissions. See e.g. 42 U.S.C. § 7403(a)(1). Moreover, as the U.S. EPA Environmental Appeals Board has made plain, the absence of explicit provisions in the Clean Air Act do not preclude the agency from considering environmental justice issues. See e.g. *In re Chem. Waste Mgmt. Of Ind.*, 6 E.A.D. 66,76 (EAB 1995) (exercising review, as a matter of policy and discretion, of environmental justice issues despite the lack of form rules).

III. U.S. EPA HAS NOT COMPLIED WITH ITS LEGAL OBLIGATIONS TO CONSIDER AND RESOLVE THE ENVIRONMENTAL JUSTICE ISSUES IMPLICATED BY ONYX'S PROPOSED PERMITS.

According to the Guzy Memo and the 2001 Whitman Memo there are at least three actions that the agency should undertake whenever environmental justice issues are raised: (1) investigate and study the threats and impacts on low-income and minority communities at risk from the agency's proposed action before taking any action; (2) provide early and ongoing opportunities for the public to be involved in the decision-making process; and (3) in instances where a state has an important permitting role ensure that the state meets the spirit and intent of EO 12898 as well. In this instance U.S. EPA has failed to take any of these three actions.

1. U.S. EPA Has Failed To Complete A Health Assessment Before It or the State Issued Draft Permits for Public Review.

One of the fundamental precepts of environmental justice is the obligation on U.S. EPA to provide access to basic information about the risks a U.S. EPA regulated activity is posing to low-income and/or minority community, and before U.S. EPA takes the proposed action. U.S. EPA did prepare a "Risk Screening Report (Draft Report)" that was attached to the draft RCRA permit and available for public review. The Draft Report is labeled "draft #5" and has the word "draft" stamped on every page. It is a draft. To this day it remains a draft.

It is unclear why the agency put forward its Draft Report at the same time it issued a draft permit for public comment. The risk screening report is a vital piece of information about the levels of risk posed to the community by this facility and the presumably appropriate limits that should be in the final permit. The public cannot intelligently comment on a draft risk screening report at the same time as comment on the draft permit, particularly when it appears there are major defects in the risk screening report. If the agency has not finalized its risk screening report, it cannot propose appropriate emission limits. The agency must therefore, at a minimum, complete its risk screening, consistent with the comments offered herein, and then revise or deny the proposed permit (complete with an opportunity for public comment).

There are other problems with the Draft Report. U.S. EPA's conclusion that the permit limits for polychlorinated dibenzodioxins and furans (PCDD/F) are protective of human health and the environment is arbitrary and capricious. The draft risk screening report asserts that, based on Onyx's recent installation of an activated carbon injection system at Unit 4 and based on trial test burns at units 2 and 3, the risk of harm from PCDD/Fs is less than 1 in 100,000. U.S. EPA then goes on to say that this result may be further analyzed in the future but at this time no further reductions are recommended. These conclusions are flawed. First, U.S. EPA's conclusions are assuming that Onyx is operating its carbon injection system in a responsible manner and complying with all applicable rules. As described above, it is arbitrary and capricious to assume Onyx is ever in compliance with its regulatory requirements. Onyx has violated and continues to violate its permit conditions. For example, in Onyx's 1999 and 2000 Total Annual Benzene and Annual Inspection Summary Reports that it submitted to U.S. EPA under letters dated March 5, 2001 and March 4, 2002, respectively, Onyx listed sixty (60) releases of benzene. Were these releases considered as part of U.S. EPA's risk screen?

The risk screen must assess the conditions that exist at Onyx – *i.e.* repeated and serious violations involving releases of PCDD/F and multiple other toxins.

The Draft Report provisions regarding lead and other persistent toxins are extremely confusing and seemingly illogical. Lead is one of the most well-tested poisons. We know it is a neurotoxin. We know that tiny amounts can strip a child of his or her potential, lower their IQ, and cause a host of behavioral problems. U.S. EPA is one of the lead federal agencies that committed in 2000 to a national strategy to virtually eliminate childhood lead poisoning within ten years, *e.g.* by 2010.

The United States will not virtually eliminate lead poisoning in Metro East if U.S. EPA does not prohibit Onyx from emitting lead pollution across the region. Children in the Metro East area already have very high blood-lead levels.[8] One of the primary reasons for such high numbers of lead-poisoned children is the very high lead-in-soil levels through East St. Louis.[9] Engaging in the most natural hand-to-mouth activities, young children inadvertently ingest this lead-contaminated soil. Despite the large numbers of children already harmed, the Draft Report and draft RCRA permit sets lead levels for the incinerator at a level that would allow surrounding lead-in-soil levels to increase up to 100mg/kg. As U.S. EPA is well aware – lead does not biodegrade, it does not volatize, it simply builds up in the soil. Authorizing Onyx to add more lead to already contaminated soil is authorizing Onyx to make an existing terrible situation even worse. Onyx, of course, has been emitting lead into the air since it began operation in 1980 and helped create the overall lead burden in Metro East. The RCRA permit must set Onyx's lead limit at zero. If it can't meet this limit, it should not be allowed to continue operating.

The proposed permit limits for the other toxins are simply incomprehensible. There is no discussion about "safe" levels. There is no discussion about the assumptions underlying the risk calculations, e.g. is the child risk factor based on a child that has a propensity to ingest dirt, *e.g.* a pica child? The Draft Report is simply inaccessible in its current form.

The Draft Report fails to discuss the environmental justice implications of the proposed permit limits and there does not appear to have been any environmental justice analysis conducted whatsoever. Such analysis must include, among other things, the risk exposure facing the residents of surrounding communities who are already lead-poisoned, those who engage in subsistence fishing in area lakes, rivers and streams, and residents who are otherwise sensitive.

This analysis should include, for example, the obvious finding that residents are already suffering from high levels of lead poisoning, many areas have high levels of lead-contaminated soil, lead is a potent and persistent neurotoxin, and therefore Onyx's permit

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[8] U.S. EPA Press Release, Aug, 21, 2001, Community Outreach Meeting Focus on Lead Issues, http://www.epa.gov/region5/news/news01/01opa138.htm(a recent screening of 189 East St. Louis school children found lead poisoning rates of 12 percent).

[9] IEPA Press Release, Oct 28, 2002, *Residential Soil Removals Begin at Two East St. Louis Sites,* http://www.epa.state.il.us/news-releases/2002/2002-185-east-stlouis.html ("a study … found the soil in many areas of East St. Louis contained high levels of lead.")

limit for lead emissions must be set at zero. The analysis for mercury is similar. Mercury levels burden residents, a significant number of residents rely on subsistence fishing and thereby increase mercury body burdens, and reducing airborne mercury emissions, especially from incinerators, can dramatically cut mercury levels in fish tissue. This success of this approach is confirmed by the recent studies performed in Florida by the State Department of Environmental Protection.[10]

2. Despite Petitioners' Environmental Justice Concerns U.S. EPA Did Not Assure Early and Ongoing Public Involvement Opportunities.

Throughout this permitting process U.S. EPA has essentially been absent and failed "to assure early and ongoing opportunities for public involvement in the permitting process." For example, U.S. EPA failed to make the RCRA permit readily available to the public. Petitioner Sierra Club repeatedly requested the agencies to provide an electronic copy or to make it available on the web. Sierra Club representatives were told that was not possible and instead must obtain a copy from U.S. EPA Region V's headquarters in Chicago. There the representative was told to pay 15 cents a page for a 240-page permit, a total cost in excess of $35. This is more than the median daily income in East St. Louis.

The U.S. EPA records Petitioners reviewed were unorganized and missing entire documents. For example, there are several references to a 2000 multimedia inspection conducted by U.S. EPA. Sierra Club submitted a Freedom of Information Act request to Region V Air and Radiation Division for Onyx records, including inspection reports. In its March 6, 2003 response U.S. EPA withheld three documents: 1) a Draft Inspection Report, undated, which is presumably the 2000 multimedia inspection report; 2) an IEPA Inspection Report from 1990, and 3) a "Gateway Quarterly Review" from 1995. Does a draft inspection report, and two other inspection reports that are thirteen and eight years old, respectively, contain "pre-decisional", "deliberative process" or "enforcement confidential" information? Are these documents still being used for an ongoing enforcement matter? Regardless, the end result is that the public does not have access to the information necessary to assess the facility's compliance history.

3. U.S. EPA Failed To Require IEPA To Consider Environmental Justice Concerns Either.

U.S. EPA's review of State-issued permits is another opportunity for U.S. EPA to address environmental justice concerns. Again, the Guzy Memo:

> Where the process for a State-issued permit does not adequately address sensitive population risks or other factors in violation of the authorized State program, under the regulations EPA could provide comments on these factors (in appropriate cases) during the comment period on the State's proposed permit on a facility-by-facility basis. 40 CFR § 271.19(a). . . .. [I]f the State is not authorized for "omnibus" authority, EPA may superimpose any necessary additional

[10] Study available at http://www.dep.state.fl.us/secretary/comm/2003/nov/1106.htm

> conditions under the "omnibus" authority in the federal portion of the permit. These conditions become part of the facility's RCRA permit and are enforceable by the United States under RCRA section 3008 and citizens through RCRA section 7002.

Guzy Memo at 4. There is no evidence that U.S. EPA has provided comments or otherwise held Illinois responsible for addressing environmental justice concerns in either the proposed RCRA permit or the proposed Title V operating permit. In fact, the record, except Petitioners comments and much of the public testimony at the public hearing, is altogether painfully silent on environmental justice issues.

The proposed Title V permit contains multiple examples where IEPA has exercised its discretionary authority in favor of Onyx, not the breathing public:

- Condition 7.1.3.c grants Onyx another extension for compliance with Subpart EEE requirements
- Page 44, Condition 7.1.7.l gives IEPA unfettered discretion to grant Onyx a one-year extension to complete a comprehensive performance test
- Page 46, Condition 7.1.7.o gives IEPA unfettered discretion to grant Onyx an unlimited time extension for submitting the Notification of Compliance
- Page 46, Condition 7.1.7.p gives IEPA, even if Onyx fails to submit a Notification of Compliance, discretion to extend the period for "pretesting or comprehensive performance testing" beyond 720 hours.

In some instances, IEPA has effectively washed its hands of any public involvement obligations altogether. On page 32, Condition 7.1.7.d.ii allows Onyx to make the site-specific and CMS performance evaluation test plans available to the public "by issuing a public notice announcing the approval of the test plans and the location where the test plans are available for review." Should not IEPA, as the regulating entity, not profit-driven Onyx, have the responsibility to determine the most accessible and convenient location to establish a document depository? IEPA's approach also fails to require Onyx to make copies available for interested persons to take offsite or provide photocopying facilities at a reasonable cost.

A systematic solution to this problem would be for U.S. EPA to revise its delegation agreements and to include in its Performance Partnership Agreements with Illinois specific actions that the State must take to avoid more of these same situations.

IV. THE ADMINISTRATOR MUST OBJECT TO ONYX'S PROPOSED TITLE V PERMIT BECAUSE IT FAILS TO COMPLY WITH APPLICABLE REQUIREMENTS

If the U.S. EPA Administrator determines that the proposed Title V permit does not comply with the requirements of the Clean Air Act ("CAA") or 40 C.F.R. Part 70, he must object to issuance of the permit. See 40 C.F.R. § 70.8(c)(1) ("The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator

not to be in compliance with applicable requirements or requirements of this part."). The permit fails to comply with the applicable requirements in a number of ways:

1. The Administrator Must Object To Onyx's Proposed Permit Because It Lacks A Compliance Schedule To Bring Onyx Into Compliance With All Applicable Requirements.

A fundamental purpose of the Title V permitting program is to ensure that regulated entities comply with CAA requirements. The applicant for a Title V permit must disclose its compliance status and either certify compliance or enter into an enforceable schedule of compliance to remedy violations. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.5(c)(8-9). Under 40 C.F.R. § 70.1(b) and Clean Air Act § 504(a), each facility that is subject to Title V permitting requirements must obtain a permit that "assures compliance by the source with all applicable requirements." Applicable requirements include, among others, the requirement to comply with state implementation plan ("SIP") requirements. See 40 C.F.R. § 70.2. If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the facility's permit must include a compliance schedule. See 40 C.F.R. § 70.5(c)(8)(iii)(C).

The compliance schedule must contain "an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance." See 40 C.F.R. § 70.5(c)(8)(iii)(C). Thus, if a toxic waste incinerator is in violation of NSR or SIP requirements, the plant's operating permit must include an enforceable compliance schedule designed to bring the plant into compliance with those requirements. The plant is then bound to comply with that schedule or risk becoming the target of an enforcement action for violating the terms of its permit.

In the present permit proceeding, Onyx has failed to certify compliance with all the requirements that apply to its facility. In its proposed permit, the IEPA has not required an updated certification, nor does it incorporate any schedule of compliance or other remedial measures in the proposed Title V permit. Notwithstanding, because there are at least two referrals at the Illinois Department of Justice for clean air violations, the permit is required to contain a compliance schedule addressing these violations and the Administrator must object because of this deficiency.

Part of the problem appears to stem from IEPA's simple misunderstanding of Title V requirements. During the public hearing the IEPA permit writer was asked about the compliance status of Onyx and the status of the enforcement cases pending with the Illinois Attorney General. The permit writer's response made it brutally clear that as of the date of the public hearing the agency failed to conduct an evaluation of Onyx's compliance history:

"I honestly don't know what the Attorney General's Office is doing ...."

Mr. Belogorsky, Lead Permit Writer, Air Bureau. Onyx Hearing Transcript at 181:4-5 (attached).

a. The Administrator Must Object to the Proposed Permit Because As The Illinois Attorney General Has Commented - The Proposed Permit Does Not Include The Very Measures That Onyx Has Identified As Necessary To Prevent The Repeat of The Same Violations That Have Previously Occurred

IEPA possesses evidence of non-compliance at this facility. The source of this information is the agency's referrals to the Illinois Attorney General for prosecution. On February 17, 2004 the Illinois Attorney General ("IAG") submitted comments to IEPA criticizing its failure to include measures in the proposed permit to assure future compliance. A copy of that letter is attached. In that letter, the IAG states:

> The incident reports filed by the current and former operators over the years have also identified a number of actions that must be taken to assure that the underlying violations will not be repeated in the future. The operators have sought to incorporate many of these actions into the applicable permits through applications to modify the permit. The proposed permits must be reviewed to assure that all of these necessary actions are included as necessary permit conditions. The incident reports filed by the current operator identified the following measures as necessary to prevent future violations:
>
> 1) To prevent exceedances of the kiln pressure limit and visible emissions, the operator must repackage potassium superoxide from oxygen breathing apparatus canisters in plastic bags and enclosed fiber drums prior to charging. See 7/17/00 Incident Report included in Appendix A.
>
> 2) In response to an October 1, 2001 release of triethylborane which resulted in a fire at the No. 2 Incinerator, the operator determined that it must develop a system for purchasing, inspecting, installing, and maintaining hoses and hose bands for use on the injector systems and to install a remotely operated fire protection system in the feeder areas. See the 10/1/01 Incident Report and Incident Investigation Report included in Appendix A.

IAG Letter at 2. The IAG letter further points out that Onyx's past violations demonstrate that the facility has difficulty handling certain toxic waste without incident. A simple compliance schedule to address that ongoing problem would be to explicitly bar Onyx from handling those specific wastes. Failure to address each of these compliance issues in the proposed permit is unlawful and, on this basis, the Administrator should object to this permit.

In light of the number of violations, the number of years these violations have been occurring and continue to occur without resolution, and that there are two additional referrals at the Illinois Attorney General's office, there is no factual basis for concluding

this facility is operating in compliance with federal and state clean air requirements. Illinois' Chief Law Enforcement Official summed it up best:

> As currently written, the permits will not assure that operation of this facility will not violate the Environmental Protection Act or regulations promulgated thereunder or adopted thereby. These deficiencies must be rectified before a determination of whether to issue the permits can be made.

IAG Letter at 5. Because of these facts the proposed Title V permit, issued by the IEPA without a schedule of compliance, is not legally adequate and the Administrator should object to the permit.

b. The Administrator Should Object To The Permit Because There Is Strong Evidence That Onyx Undertook Modifications That Triggered Requirements Arising Under New Source Review

The second compliance issue related to Onyx is whether this facility unlawfully avoided New Source Review (NSR) and, in turn, the requirement to install modern pollution control equipment. If Onyx illegally avoided NSR, the Title V permit should include an enforceable schedule of compliance for NSR to occur, coupled with emission and operational standards equivalent to a new facility in this source category.

The Attorney General's Office raised the possibility that Onyx undertook illegal modifications in its assessment of prior violations:

> The October 1, 2001, Incident raised another significant issue. The fire resulting from the triethylborane release spread from the Unit No. 2 Incinerator into the Specialty Feeder Building as a result of modifications made by the operator which compromised the fire containment capability of the wall between the Incinerator and the Specialty Feeder Building. Approval for this alteration through the required permit modification process had been neither sought nor obtained. Accordingly, the modification was performed in a manner which did not maintain the fire containment capability of the wall. The facility must be audited to identify all other unpermitted modifications so that they may assessed to determine whether other safeguards have been undermined and what corrective measures must be employed to eliminate these existing threats to public health and safety and the environment.

AG Letter at 2 (emphasis added).

Whether Onyx unlawfully avoided NSR is directly relevant to Title V permitting for two reasons. First, as described above, ensuring compliance with the requirements originating in the Clean Air Act is a fundamental goal of the Title V/CAAPP permitting process. In turn, there may be no more important Clean Air Act requirement than compliance with New Source Review.

NSR is a pre-construction permitting program that serves two important purposes: first, it ensures that factories, industrial boilers and power plants comply with air quality standards when components are modified or added to these facilities; and, second, NSR requires that new plants or existing plants undergoing a major modification install state-of-the-art control technology. 42 U.S.C. § 7401(a)(1); 42 U.S.C. § 7401(a)(2). The program covers two distinct categories: (1) the construction of new industrial facilities, and (2) existing facilities that make any modifications that significantly increase pollution emissions and are not exempt from regulation. United States v. Ohio Edison Co., 2003 U.S. Dist. LEXIS 13799, *11 (S.D. Ohio, Aug. 7, 2003). If a facility falls into one of these two categories, then the company is required to establish stringent emissions controls. 42 U.S.C. § 7411(a)(1). If a modification is known to substantially increase the amount of emissions from a facility, the facility must obtain pre-construction approval. Ohio Edison, 2003 U.S. Dist. LEXIS 13799, *11; see, e.g., 42 U.S.C. § 7475.

Congress has defined a modification as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4); see also 40 C.F.R. § 60.14(a) (U.S. EPA defining a modification as "any physical change or operations change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies"). A determination that New Source Review has been triggered by site modifications would require the source to comply with new source requirements and apply state-of-the-art pollution controls, which are much more stringent than emission limits proposed without a permit. 42 U.S.C. § 7411(a)(1); see also Ohio Edison, 2003 U.S. Dist. LEXIS 13799, *56.

There is a second reason why NSR is directly relevant to the Title V permitting process. The IEPA developed the proposed permit containing emission and operational standards explicitly and seemingly without question based on the applicant's representations that it is not subject to new source standards. If, however, Onyx were subject to New Source Review, then entirely different emission and operational standards would apply than those included by IEPA in the proposed permit. Simply, in the absence of determining if NSR applies, IEPA cannot know which emission and operational standards apply to Onyx. In sum, as a prerequisite to setting the emission and operational standards in a Title V permit, IEPA must determine whether NSR applies. Because IEPA failed to do this, the proposed permit is defective and the U.S. EPA Administrator must object.

2. The Administrator Should Object To the Proposed Permit Because It Was Based On An Eight-Year Old Application That Had Never Been Updated.

Onyx's application was over eight years old when IEPA issued the draft Title V permit. To the best of our knowledge IEPA never required an updated application, including a new compliance certification submission. Onyx must be required to update its application to include any new information, such as new equipment and other information that is highly relevant to issuing a meaningful permit. It is unreasonable for

IEPA to rely on an outdated permit application. On this basis, the Administrator should object to this proposed permit.

3. The Administrator Must Object to the Proposed Permit Because It Contains Conditions That Are Not Practically Enforceable

Onyx's proposed Title V permit contains numerous conditions which are not practically enforceable. This is a violation of U.S. EPA policy regarding practical enforceability and, consequently, the Administrator must object to the permit. For a permit condition to be enforceable, the permit must leave no doubt as to exactly what the facility must do to comply with the condition. U.S. EPA Region 9 Title V Permit Review Guidelines, Sept. 9 1999, p. III-46.

> 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.

Id. Although some of the language identified below (i.e., "reasonable" or "significant") may be quoting directly from the Act or regulations, this is not sufficient to justify the IEPA's use of this language verbatim in the permit and overcome the practical enforceability problem. It is the responsibility of the Agency to interpret and implement the Act and regulations. One obligation under this responsibility involves translating language from the Act or regulations that would not be practically enforceable in a permit to language to be included in a permit that clearly and specifically identifies what a facility must do.

Following are specific examples:

Page 28 - Condition 7.1.6.b.ii requires Onyx to "notify IEPA of the intent to incinerate [dioxin-listed hazardous waste]". When must such notification occur? In what format? How is the public supposed to monitor compliance with this requirement?

Page 41 – Condition 7.1.7.g is a new provision that requires Onyx to operate the incinerator during the performance test under "normal conditions (or conditions that will result in higher emissions)". There is a similar provision in the two following subsections. This strange provision has two obvious flaws – should the performance test be under "normal conditions" or "conditions that result in higher emissions"? It can't be both. Moreover, "higher emissions" of which pollutants?

Page 46 – Condition 7.1.7.p requires Onyx to "cease hazardous waste burning immediately" if it fails to "postmark a Notification of Compliance." This must be a simple, but important, drafting error.

Page 84, Condition 7.1.9.a.ii uses the term "you" rather than "Permittee" the term that is used everywhere else. This is probably just a simple, but confusing, drafting error. In this same section there is a reference to "owners and operators of lightweight aggregate kilns" and "cement kilns." Presumably these provisions don't have anything to do with Onyx, rather just highlight IEPA's failure to tailor the applicable statutory and regulatory requirements to this facility.

Finally, Condition 7.1.5 does not define the following terms: "container," "containerized solids" or "manufacturer's specifications." These terms need to be defined.

4. The Administrator Must Object to the Proposed Permit Because It Contains A Permit Shield That Broadly Insulates It From Ongoing and Recent Violations.

The Administrator has to object to the proposed permit because it contains a permit shield that is overly broad. Condition 8.1 is a broad permit shield that is unwarranted and threatens to undermine the Illinois Attorney General's pending enforcement cases against Onyx. A Title V permit shield is not available for noncompliance that occurred prior or continues after the submission of an application. For example, the Illinois Attorney General is currently prosecuting two separate enforcement matters against Onyx.

2. The Administrator Must Object to the Proposed Permit Because It Fails to Include Conditions that Meet the Legal Requirements for Monitoring.

The necessary monitoring is strictly regulated by 40 C.F.R. § 70.6(a)(3)(i):

> Each permit shall contain the following requirements with respect to monitoring: (A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. . . . (B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . . .

40 C.F.R. § 70.6(c)(1) states that "All part 70 permits shall contain . . . testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." CAA § 504 and 40 C.F.R. § 70.6(a)(3) require that permits indicate the frequency at which testing shall take place.

Page 56, Condition 7.1.8.b.ii. provides that Onyx must install, calibrate, maintain, and operate a particulate matter CEMS to demonstrate compliance ...." However, the next clause provides that the requirement to "install, calibrate, maintain, and operate the PM CEMS is not required until such time that the USEPA promulgates all performance specifications and operational requirements applicable to PM CEMS." Without the

obligation to install and operate the PM CEMS there is no other PM monitoring and compliance method established in the proposed permit. Consequently the proposed permit fails to include "requirements sufficient to assure compliance" and therefore the Adminstrator should object to this provision as well.

6. The Administrator Must Object To the Proposed Permit Because It Does Not Contain A Statement of Basis.

A statement of basis is required by 40 CFR 70.7(a)(5) and Section 39.5(8)(b) of the Illinois Environmental Policy Act. An SOB must set forth the legal and factual basis for the draft permit conditions. It must contain information about applicability determinations and a discussion of such if they are complex, monitoring selected, operational flexibility, streamlining rationale, basis for exemptions from requirements, and the inclusion of any other factual information and reference of all supporting material relied upon in the permitting process. Especially in this case, where the applicability determinations are difficult and unclear. There is no clear explanation of how the actual limitation or requirement applies to this facility, which makes it impossible to determine whether it is complying with the condition. There are a number of such problems, identified in Petitioners' comments and those of the Illinois Attorney General. For example, Condition 5.2.6, should have been rewritten to reflect that the facility is subject to 35 IAC 244.142.

7. The Administrator Must Object To the Proposed Permit Because It Does Not Require Prompt Reporting of Violations

Prompt reporting is required pursuant to 40 C.F.R. § 70.6(a)(3)(iii)(B) and ILCS 39.5(7)(ii):

> Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective measures taken.

The reporting requirements in Condition 7.7.10 do not require the source to report deviations promptly. Instead, Onyx is granted up to 30 days to file a report with IEPA. This is unlawful and another basis for the Administrator to object to the proposed permit.

8. The Administrator Must Object To the Proposed Permit Because It Fails To Establish Annual Mercury and Lead Limits.

This permit is written so poorly it appears there are no annual limits on mercury and lead emissions. This is unlawful and is grounds for the Administrator to object to this permit.