

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA**

**THE SIERRA CLUB; THE CHEMICAL WEAPONS
WORKING GROUP; CITIZENS AGAINST
INCINERATION AT NEWPORT (CAIN);
COMMUNITY IN-POWER DEVELOPMENT
ASSOCIATION (CIDA); SARA MORGAN;
LEONARD AKERS; HILTON KELLEY;
MOYA GREEN; AND ANISHA SWALLOW,**

Plaintiffs,

v.

Case No. _____

**DR. ROBERT M. GATES, SECRETARY OF
DEFENSE; PETE GEREN, SECRETARY OF THE
ARMY; UNITED STATES DEPARTMENT OF
DEFENSE; UNITED STATES DEPARTMENT OF
THE ARMY; VEOLIA ENVIRONMENTAL
SERVICES, INC.,**

Defendants.

COMPLAINT

I. JURISDICTION AND VENUE

1. The United States District Courts have jurisdiction to hear Plaintiffs' federal statutory claims brought in the instant action, claims which are stated *infra*, pursuant to the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a), and pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).
2. The United States District Courts have jurisdiction to hear Plaintiffs' Indiana State law claims in the instant action, claims which are stated *infra*, via supplemental jurisdiction

pursuant to 28 U.S.C. § 1367.

3. The United States District Court for the Southern District of Indiana is the proper venue for the instant action pursuant to 42 U.S.C. §§ 6972(a).
4. The limited bars to jurisdiction and timing of judicial review in the applicable federal statute do not apply here to limit, postpone or deny federal court jurisdiction to hear Plaintiffs' claims stated *infra*. The jurisdictional bars or restrictions in 42 U.S.C. §§ 6972(b) do not apply in the instant action.
5. The jurisdictional bars and limitations in the Solid Waste Disposal Act (SWDA) as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(b) are not applicable here. There is no diligent prosecution by a federal or state agency in a court or otherwise to enforce the RCRA requirements that Plaintiffs here allege the Defendants to be violating or to abate the particular imminent hazards of which Plaintiffs complain.

II. NOTICE REQUIREMENTS

6. The notice requirements of the applicable federal statute, 42 U.S.C. §§ 6972(b)(1)(A), (b)(2)(A), and (C); and 40 C.F.R. Part 254, have been met by Plaintiffs. Proper notice was served on the required parties on April 27, 2007 and May 3, 2007. Because the RCRA violations and imminent hazards complained of involve RCRA hazardous waste violations (violations of RCRA subchapter III), the claims involving such violations may be brought immediately pursuant to 42 U.S.C. 6972 (b)(1)(A), (b)(2)(A), and (c).

III. WAIVER OF IMMUNITY

7. Any immunity otherwise applicable to the United States or any of its agencies in regard to Plaintiffs' claims has been expressly waived by federal statute via the Federal Facilities Compliance Act which is codified with RCRA and states:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

42 U.S.C. § 6961.

8. A copy of this Complaint was served on the Attorney General of the United States Alberto R. Gonzales and upon EPA Administrator Stephen L. Johnson.

IV. PARTIES

A. Plaintiffs

9. Plaintiff The Sierra Club is a national membership non-profit organization. Sierra Club's purpose is to promote conservation of the natural environment. Sierra Club has 750,000 members nationwide. The Sierra Club has members in Indiana as well as each state along the CVXH transportation route, including the destination state, Texas. In the event of an accident during transport, The Sierra Club's members could be harmed by the release of agent VX, EA2192 and CVXH. The Sierra Club's members in Texas could be harmed by the emissions of unburned VX and EA2192 and other toxic components of CVXH and byproducts of CVXH incineration. The Sierra Club may be contacted at the following address: Kristin Henry, Esq., The Sierra Club, 85 Second Street, San Francisco, CA 94105.

10. Plaintiff Chemical Weapons Working Group (CWWG) is a national grassroots coalition of citizens and citizen organizations near U.S. chemical weapons stockpile sites of Alabama, Arkansas, Colorado, Indiana, Kentucky, Maryland, Oregon, Utah and in the Pacific. The CWWG's mission is to promote environmental justice and protect public health of all citizens affected by the U.S. chemical weapons legacy by 1) demanding safe, non-incineration technologies for disposal of chemical weapons and secondary wastes; and 2) government accountability through direct citizen involvement in the chemical weapons program decision-making process. The CWWG believes that where citizens are encouraged and empowered, solutions to our lethal chemical weapons legacy will follow. The CWWG has members in Indiana as well as some states along the CVXH transportation route, including Arkansas and Alabama. In the event of an accident during

transport, CWWG's members could be harmed by the release of agent VX, EA2192 and CVXH. CWWG may be contacted at the following address: Craig Williams, Director, CWWG, c/o Kentucky Environmental Foundation, P.O. Box 467, 128 Main Street, Berea, KY 40403.

11. Plaintiff Citizens Against Incineration at Newport (CAIN) is a citizens group dedicated to the safe disposal of chemical weapons stockpiled at the Army's Newport Indiana Chemical Depot and any secondary wastes created during the process of destroying that stockpile. CAIN is opposed to incineration of chemical weapons, chemical warfare agent, and secondary waste created from the treatment of chemical weapons and chemical agents, including VX hydrolysate (CVXH). CAIN is in favor of on-site disposal of the Newport Chemical Depot's secondary wastes including CVXH. CAIN is in favor of the use of alternative treatment technologies for treatment of CVXH that are more modern than incineration and are "closed loop" – i.e. have the capability to hold and test, and re-treat if needed, before the release of treatment residuals to the environment. CAIN believes that on-site treatment using such alternative technologies offers greater protection for public health and the environment. CAIN has members who reside near the Newport Depot including Sara Morgan. In the event of an accident during transport, CAIN's members could be harmed by the release of agent VX, EA2192 and CVXH. Ms. Morgan would most likely be downwind from such an accident. CAIN may be contacted at the following address: Sara J. Morgan, Spokesperson, CAIN, 5172 W. 500 N., Montezuma, Indiana 47862.

12. Plaintiff Community In-Power Development Association (CIDA) was founded in 2000 to

deal with social and economic issues in the city of Port Arthur, TX. Residents and CIDA members realized that they had other problems as well including notably environmental injustice. CIDA members took it upon themselves to stand up for the community's basic human right to breathe clean air and drink clean water. CIDA is a voice for the people of Port Arthur when advocating for environmental justice. CIDA was appalled at the lack of public notice concerning the VX hydrolysate. CIDA feels that the Army and its contractors shared responsibility for letting the community know about the shipment, especially since the Army went through such great lengths to inform and consult with the public in its two previous attempts to ship the waste. At the very least there should have been a well-advertised, open public meeting to inform the residents of this risk and yet there was none. CIDA is responsible to the residents of Port Arthur to educate them on the risks of all forms of pollution in the community, including the risks of VX hydrolysate incineration. In this case the lack of proper analysis of the waste and the worker reports of higher concentrations of nerve agent in the hydrolysate are putting the community at unacceptable risk. Community In-Power Development Association (CIDA) may be contacted at the following address: c/o Marie Kelley, 601 Woodworth Blvd., Port Arthur, TX 77642.

13. Plaintiff Hilton Kelley, a 47 year old resident of the city of Port Arthur, Texas has been a resident of Port Arthur most of his life. He is a veteran of the United States Navy and dedicated to protecting his country, his community, his family and his neighbors. Mr. Kelley's wife, son, and three stepchildren also live in Port Arthur. Mr. Kelley has the following concerns. For years his community has had to deal with toxic waste and

pollution from local refineries and chemical plants. He and other community members are concerned about the toxic air that they breathe. A disproportionate number of people in his community have asthma and other respiratory diseases, as well as liver and kidney disease. Many of the residents suffer from hypertension. He and other community members believe there is a direct correlation between those illnesses and the toxic emissions from the area's pollution sources. He and members of his community are also concerned about the emissions from the Veolia waste incinerator. His community can not afford more air pollution. He and other community members are concerned that transporting the Newport Army Chemical Depot VX hydrolysate to his community would worsen existing pollution related health problems in Port Arthur. He is concerned that VX nerve agent hydrolysate has never been incinerated anywhere, much less in the city of Port Arthur. He and other community members are concerned that the Veolia incinerator plant has never dealt with this specific type of material. He believes that Veolia cannot adequately handle this VX hydrolysate material, and particularly so given that it does not have monitors to detect chemical agent, there is no way to test for EA 2192, and there are no procedures in place to test the concentrations of VX nerve agent, EA2192 or other toxics before the waste is fed into the incinerator. Hilton Kelley may be contacted at 910 Colorado Ave., Port Arthur TX 77642, (409) 498-1088.

14. Plaintiff Moya Green moved to Port Arthur, Texas in the summer of 1989. She is 35 years old and has asthma. Her son is 16 years old and her daughter is 14 years old. They both have asthma and also have irregular liver enzyme levels. Her daughter also has a rare liver disorder called NASH, which can lead to cirrhosis of the liver. At birth her

daughter had an underdeveloped kidney which has caused a lot of other health problems. Her children's school, Stephen F. Austin Middle School, is near the incinerator and there is a constant odor in the air from the waste incinerator and other industry. Ms. Green upon learning about the VX nerve agent hydrolysate shipment was outraged that this company did not reach out to the public about this, because this type of hydrolysate has never been burned before and the health impacts are unknown. Most people in the community still do not know about this shipment. Ms. Green believes that the shipments need to stop and the waste needs to be destroyed safely in Indiana, not be brought to Port Arthur, Texas where the community is already suffering so badly from the effects of air pollution. Ms. Green may be contacted at 3029 Fifth Ave., Port Arthur, TX 77642, (409) 982-0940.

15. Plaintiff Anisha Swallow is a twenty-one year old resident of Port Arthur, Texas. She lives in close proximity to the incinerator. Ms. Swallow has lived in Port Arthur all of her life. Ms. Swallow has a one year old child and a three year old child. Her one year old child suffers from asthma. Ms. Swallow may be contacted at 249 17th Street, Port Arthur, TX 77640, (409) 332-9739.
16. Plaintiff Sara Morgan has been a resident of Parke County, Indiana for thirty-two years. She is a native of Parke County. Her home is about three miles away from and directly east of the Newport Chemical Activity, which is presently destroying the nerve agent VX by a process of neutralization. Ms. Morgan has the following concerns. Although VX is the most lethal substance ever produced, she has not been at risk from its neutralization being so close to her home because the process has been safe and non-emissive. She also

would not have been put at risk by the Army's original plans to treat the byproducts of the neutralization on-site with a super critical water oxidation process also proven to be safe and non-emissive. However, now that the Army has changed its plans and is shipping the neutralization waste (hydrolysate) by inter-modal tanks on flat bed trucks to Port-Arthur, Texas, she is at risk. Although the by-product of the neutralization process is decreased in toxicity, by the Army's own admission there could be as much as 20 ppb VX in the waste, plus other highly toxic substances such as EA 2192, which has been detected in the hydrolysate at as much as 500 ppm. Insiders who work at the Newport facility have revealed that they have seen records showing that the concentration of VX in the waste is much higher in some cases. There is also evidence that the longer the VX is stored in the inter-modal tanks (which were never meant to be used for storage since there is no means of stirring the waste and keeping the VX evenly distributed) the more the waste separates into layers with the VX concentrating in the top layer. Therefore, if one of the flat-bed trucks were to be involved in an accident within a few miles after leaving the facility, and the waste leaked out of the tank, there is a good possibility that a sizable amount of VX would seep into the groundwater and the Wabash River. Local groundwater is the source from which Ms. Morgan and her family get their drinking water. If a truck were to catch fire and explode in an accident, the VX contained in the waste would be airborne and dispersed for miles around. VX disperses very rapidly when heated. If Army officials are forced to come to their senses and return to their original plan of treating the VX neutralization by-product on-site as they promised with a non-emissive technology, the risk to Ms. Morgan and her family would be significantly minimized. Sara Morgan may

be contacted at the following address: Sara J. Morgan, 5172 W. 500 N., Montezuma, Indiana 47862.

17. Plaintiff Leonard Akers is a resident of Clinton, Indiana, in Vermillion County. He is a life-long resident of Vermillion County and his home is about twelve miles south from the Newport Army Depot. Mr. Akers is a member of the CWWG and CAIN. Mr. Akers has the following concerns. He and his family have been put at risk by the Army's secret plans to ship the hydrolysate by-product from the neutralization of the lethal VX nerve agent, which is presently going on at the Depot, out of Indiana to Port Arthur, Texas. Without notifying anyone, Army officials changed their plans from treating the waste on-site with a non-emissive technology to shipping it out on flat-bed trucks in inter-modal tanks. If one of these trucks were to have an accident anywhere within several miles of the depot and spill the hydrolysate, any VX remaining in the waste would seep into the groundwater and the Wabash river, contaminating local sources of drinking water for residents. The VX left in the waste, by the Army's own admission could be much as 20 ppb and there are folks who work at the depot who say that there are records that show VX at much greater levels than 20 ppb. The inter-modal tanks, which have been used to store the VX waste for many months are apparently not in very good shape and were never meant to be used for storage because there is no way to stir the hydrolysate and keep the VX evenly distributed, so the VX tends to accumulate in the top layer, which would make its concentration much higher than 20 ppb. Leakage of such waste into the groundwater in case of an accident is not an acceptable risk for him. It would be an even greater risk if the truck were to wreck, catch fire and send particles of VX out for miles.

No one knows how much VX would be involved in such a scenario or how far it would go. Stopping the shipments and forcing the Army to go back to its original plan to treat the hydrolysate safely onsite would end the risk to him and his family.

B. Defendants

18. Defendants Mr. Pete Geren, Secretary of the Army, who is sued in his official capacity, and the United States Department of Army, the federal agency within the United States Department of Defense that possesses the VX waste at issue and is undertaking its destruction and disposal under the Chemical Weapons Convention, have decision making authority regarding whether, and the manner in which, the VX and CVXH will be treated and transported, subject to the authority of the Secretary of Defense. The Department of Army, under Secretary Geren, control the Newport Army Depot and the Newport Chemical Agent Disposal Facility (NECDF) at which the chemical agent VX is being neutralized and from which the caustic VX hydrolysate which is the subject of this complaint is being shipped. The Department of Army and Secretary Geren also control the United States Army Chemical Materials Agency, the intermediate Army office that governs the disposal of chemical weapons generally and the chemical agent disposal operations at the Newport Army Depot and at the NECDF specifically.
19. Defendants Dr. Robert M. Gates, Secretary of Defense, and the United States Department of Defense, have ultimate authority over the Secretary of the Army and the Department of Army. Defendant Robert M. Gates is sued in his official capacity as head of the Department of Defense, and is responsible for complying with Federal laws governing the

transport, destruction and disposal of the Nation's chemical weapons stores.

20. Defendant Veolia Environmental Services, Inc. operates the incineration facility in Port Arthur, Texas that is receiving the CVXH for treatment and is responsible for the transport of the CVXH from the Newport Chemical Depot in Indiana to its incineration facility in Port Arthur, Texas, directly or via a subcontractor.

V. COUNTS

COUNT 1: ALL DEFENDANTS' ACTIONS IN TRANSPORTING AND INCINERATING CHEMICAL WARFARE AGENT VX CAUSTIC HYDROLYSATE (CVXH) ARE CONTRIBUTING TO AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO PUBLIC HEALTH AND THE ENVIRONMENT

21. The Plaintiffs bring this imminent and substantial endangerment claim against all Defendants to enjoin the ongoing and imminent hazards posed by the current hazardous waste transportation and incineration activities. These hazardous waste transportation and incineration activities pose an imminent hazard to human health and the environment for the reasons detailed herein.
22. The Army is in the process of chemically neutralizing large quantities of chemical warfare agent VX at the Army's Newport Chemical Depot in Indiana.
23. The Army's VX neutralization process results in the creation of a large quantity of VX hydrolysate (CVXH). Approximately two million gallons of hydrolysate is expected to result from the neutralization of the VX agent at Newport.
24. VX nerve gas – O-ethyl-S-[2-(diisopropylamine)ethyl]methylphosphonothionate – is one of the deadliest substances ever produced by man.

25. VX acts as an anticholinesterase that blocks nerve impulses by inhibiting the activity of the enzyme cholinesterase. All nerve agents, including VX, cause their toxic effects by preventing the proper operation of the chemical that acts as the body's off-switch for glands and muscles.
26. VX is the most toxic and deadliest nerve agent created by man, and is acutely toxic through oral, inhalation, or dermal contact routes. Compared with the nerve agent sarin (also known as GB), VX is considered to be much more toxic by entry through the skin and somewhat more toxic by inhalation.
27. Any visible VX liquid contact, unless washed off immediately, could be lethal.
28. According to the Material Safety Data Sheet for VX (MSDS) VX has a variety of symptoms, and a fatal dosage usually results in death within 15 minutes.
29. A fire may spread VX contamination to other areas including sewers.
30. If VX is heated to high temperatures, it can turn into vapor. Contact with VX vapors from a fire can be fatal.
31. People can be exposed to VX by ingesting contaminated food or water. VX also breaks down slowly in the body, so VX will bioaccumulate within people and other organisms.
32. VX evaporates as slowly as motor oil, so it is very persistent in the environment and can be a long-term threat .
33. Caustic neutralization of VX using sodium hydroxide produces a liquid waste stream of material, VX hydrolysate (CVXH).
34. Since VX is an ester, hydrolysis can be used to break it down into its component parts. The primary products of the hydrolysis process are commonly referred to as EMPA,

MPA, thiolamine and ethanol. Another product is known as EA2192. Small quantities of unreacted VX are also likely to persist through some or all phases of the treatment process.

35. EMPA and MPA are both toxic compounds, the toxicity of which are not well tested.
36. Thiolamine has a strong odor and prolonged inhalation poses a health risk, with a maximum allowable air concentration of 40 parts per billion.
37. EA2192 is also an anticholinesterase nerve agent like VX.
38. EA2192 is approximately 1/10 to 1/2 as toxic as VX.
39. Several metals including arsenic, chromium, and lead are also in CVXH.
40. The caustic neutralization of a synthetic chemical such as VX is almost certain to have numerous other “minor” byproduct chemicals, such as various types of polymers, with potentially significant detrimental environmental impacts. Polymers are highly stable synthetic chemicals that are created by the addition of strong alkalis such as sodium hydroxide to monomeric units such as VX. These “minor” components of CVXH are not well known and studied and could have vastly toxic attributes.
41. In regards to the toxicity of other components of the CVXH besides the primary constituents that EPA and others raised as concerns, the United States Center for Disease Control (CDC) was unable to locate substantial studies or data to address this question.
42. Both VX and EA2192 are lethal to humans and animals at very low doses.
43. CDC found the individual DuPont and U.S. Army toxicity studies regarding CVXH to be limited in scope and applicability.
44. CDC reviewed toxicity studies of CVXH. One study found the CVXH to be highly toxic,

one of only eight studies analyzed. CDC discounted the study as not representative. CDC concluded that several other studies had technical flaws which prevented definitive conclusions being drawn about the toxic effects of the CVXH. CDC noted that one study gave positive predictions of toxicity for development effects for both MPA and EMPA, and bacterial mutagenicity for EMPA, but CDC again considered the study to not be reliable. CDC concluded that the supporting studies do not provide adequate data on the nature of the toxicity of the EMPA and MPA constituents in the CVXH. Regarding another primary CVXH constituent, thiolamine, CDC also indicated that toxicity information is limited.

45. It is undisputed that CVXH is highly corrosive. Dermal contact would result in severe, possibly irreversible damage. Eye injury is also possible. Inhalation of aerosolized CVXH could damage the respiratory tract.
46. The CVXH contains both undestroyed and/or reformed VX and EA 2192 at concentrations greater than 48 ppb VX and 500 ppm EA2192.
47. Considerable uncertainty exists regarding the maximum concentrations of VX and EA2192 that may be present or reformed over time.
48. The VX and EA2192 will concentrate over time in an upper organic layer in the CVXH, which upper layer comprises about 3% of the total CVXH volume.
49. If the 48 ppb VX and 500 ppm EA2192 samples reported by employees at the Newport Depot/NECDF were taken from mixed CVXH, then the upper organic layer once separated could contain concentrations 33 or more times greater than the reported 48 ppb VX and 500 ppm EA2192.

50. If the spills, from which the samples were taken that showed 48 ppb VX and 500 ppm EA2192, occurred while the separation of the layers was in progress but not complete, and the samples were taken from the forming lower layer, then the concentrations of VX and EA2192 could be even higher in the upper layer than 33 times greater than the reported 48 ppb VX and 500 ppm EA2192.
51. Scientific studies indicate that organophosphates (which include VX, EA2192 and some pesticides) may have toxic synergistic effects when two or more are present together. Such synergy can result in the mixture having 50 times greater toxicity than would be expected from adding the toxicity of the components.
52. VX and EA2192 are present together in the CVXH.
53. Many members of the public have already been exposed to organophosphate pesticides .
54. Synergistic toxic effects from exposure to CVXH cannot be ruled out.
55. Organophosphates (OPs) can have sensitizing toxic effects such that a lower dose is required to cause harm after one or more exposures have occurred.
56. Infants and children are more sensitive to toxic chemicals including OPs than adults.
57. There is significant scientific uncertainty regarding the question of how much less VX or EA2192 it would take to harm or kill an infant or child compared to the healthy adult males for which agent VX was intended to be lethal.
58. An uncertainty factor of 10-100 or more may be required in calculating OP exposure risk to infants, children or a developing fetus based on adult toxicity data.
59. The Army's toxicity tests on CVXH were performed on CVXH having no detectable EA2192 or VX.

60. The above referenced Army toxicity tests on CVXH led the Army to conclude that the CVXH has a toxicity approximately 1,800 times less than pure VX.
61. A toxicity 1,800 times less than VX would equate to the toxicity of 550 parts per million (or 550,000 ppb) VX (for adults).
62. CVXH having detectable amounts of VX and EA2192 would be more toxic than CVXH with no detectable VX or EA2192.
63. If the mixture of VX and EA2192 causes synergistic effects, or does so when humans with prior OP pesticide exposures are exposed to the CVXH, then there is the potential for a 50 times greater toxicity than would even be expected in the concentrated upper layer (still considering only toxicity data for adults).
64. If the EA2192, as has been reported, has a toxicity approximately $\frac{1}{2}$ that of VX, then the 500 ppm EA2192 reported is the toxic equivalent (without considering synergy) of 250 ppm VX.
65. This 250 ppm VX equivalent toxicity, added to the approximately 50 ppb of actual VX reported to be in the CVXH, gives a mixture, assuming only additive toxicity (without synergy) equivalent to approximately 125 ppm VX.
66. If this 125 ppm VX equivalent toxicity from the combined VX and EA2192 concentrations is magnified by $\frac{331}{3}$ times due to the separation of the VX and EA2192 into an upper layer having 3% of the total volume, then the upper layer will have a toxicity equivalent to 4,164 ppm VX (considering only the VX and EA2192 and not the $\frac{1}{1800}$ VX toxicity of the CVXH generally).
67. If a synergistic toxic effect is present due to the EA2192/VX mixture or eventual

- exposure of a person already having experienced exposure to other OPs such as some pesticides, then the toxicity of the VX/EA2192 components of the CVXH could equate to 200,000 ppm VX (50 x 4000). This would be equivalent to a concentration of 20% VX.
68. If a safety/uncertainty factor of 10-100 is used for the likely greater sensitivity of infants and the developing fetus, then the VX and EA2192 in the upper layer, as a mixture, assuming synergy as above, may be as toxic to an infant as VX for an adult.
 69. Serious harm to health short of death to an adult may occur at VX concentrations considerably less than those needed to be lethal to an adult. Serious harm can occur to an adult exposed to less than 1/4 of the lethal VX concentration, possibly considerably less.
 70. Wind speed affects VX toxicity. If a person is exposed to VX transported by high speed winds, the toxicity of the VX will be significantly greater than during lower wind speeds.
 71. In an auto/truck accident involving an exploding gas tank and spilled or leaked CVXH, the VX and EA2192 present could be transported through air with explosive force, causing even greater toxicity than at maximum natural wind speeds.
 72. The government's reported risk of a release of the CVXH to the environment due to an accident (apparently ignoring the history of leaking containers) is 1 in 13 thousand per trip.
 73. Given the toxicity of the CVXH, and the VX and EA2192 in the CVXH, as described above, together with synergistic effects, concentration in the upper layer, greater sensitivity of an infant or fetus, and greater toxicity with higher wind speed, an accident involving a passenger vehicle or, heaven forbid, a school or other bus, would be very likely to cause serious illness, injury and possibly fatalities, particularly if infants or

previously OP-sensitized individuals are involved.

74. The government's estimate of the probability of an accident involving a release of CVXH is 1/13,000 per trip.
75. Approximately 2,000,000 gallons of CVXH will be shipped.
76. One 4,000 gallon intermodal container of CVXH will be shipped per truck.
77. 2-6 trucks per convoy will travel through IN, IL, MO, AR, TN, MS, LA, and TX.
78. Approximately 500 single truck trips will be required. Approximately 125 4-truck convoys will be required.
79. EPA's unacceptable risk standard for cancer for hazardous waste facilities is a 1-10 per million risk.
80. EPA's unacceptable risk standard for non-cancer adverse health effects is a hazard quotient (for a single chemical) and a hazard index (for multiple chemicals affecting the same target organ) of less than 1.0 (including consideration of combined effects from known multiple sources), or a hazard quotient of 0.25 for a single source alone (when the emissions from other pollution sources that create a combined effect are unknown).
81. EPA calculates the hazard quotient by dividing the predicted exposure by the reference dose (RfD) (virtually safe dose) for a single chemical in question (which results in a hazard quotient).
82. EPA calculates the hazard index by summing the hazard quotients for all chemicals in question that impact the same target organ.
83. The intermodal containers being used to transport the CVXH have a history of leaking.
84. The Defendants, despite reports relayed to them by Plaintiffs from Newport Chemical

Depot/NECDF employees that samples of spilled CVXH contained 48 ppb VX and 500 ppm EA2192, have failed and refused to retest the CVXH or its top layer before transport of the CVXH from Indiana to Texas.

85. The Defendants continue to inaccurately represent that the CVXH being transported contains no detectable amount of VX or EA2192.
86. The Defendants have not adequately analyzed and identified the toxic and hazardous contaminants expected to be present in the air emissions from the incineration of the CVXH.
87. The Defendants have failed to properly evaluate the risks to public health and the environment posed by the air emissions and releases from an accident during transport of the CVXH.
88. The Defendants' planned incineration method will not adequately destroy the highly toxic agent VX and EA2192 constituents of the CVXH at the concentrations found in the CVXH.
89. Existing and planned air monitoring equipment and procedures at the Veolia incineration facility are not capable of detecting either agent VX or EA2192 in air emissions in the event of an accident, incident, malfunction or routine failure to destroy either contaminant.
90. There are numerous residential and agricultural areas along the CVXH transportation routes from Indiana to Texas.
91. There is a significant potential for human exposure to the highly toxic agent VX and EA2192 in the event of a transportation accident, spill or leak.

92. RCRA, via the citizen suit provision, provides for injunctive relief upon a showing that a defendant is handling or has handled solid or hazardous waste in a manner that contributes to the creation of an imminent and substantial endangerment to the public or the environment (an imminent hazard). 42 U.S.C §§ 6972(a)(1)(B).

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--

(1) . . .

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which **may present an imminent and substantial endangerment to health or the environment.**

42 U.S.C. § 6972(a)(1) [emphasis added]. Only threatened harm is required, not actual harm, in order to support a claim of imminent endangerment under RCRA, either 42 U.S.C. § 6972(a)(1)(B) (citizen plaintiff) or 42 U.S.C. § 6973 (government plaintiff). *Reserve Mining Company v. EPA*, 514 F.2d 492, 519 (8th Cir. 1975); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 - 1356 (2d Cir. 1991), *rvsd. on other grounds*, 112 S. Ct. 2638 (1992); *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982).

93. Children are likely to be the population most impacted by an accidental release of CVXH during transport or incineration.

94. Children are more sensitive than adults to toxic chemical exposures, including organophosphates (OPs) such as VX and EA2192.

95. Children also receive greater doses of such toxic chemicals per unit of body weight than

adults.

96. Agent VX and EA2192 once released to soil are persistent and would likely remain on the soil for months if not years.
97. Children are more at risk than adults from toxic releases that contaminate soil. EPA and the federal Agency for Toxic Substances and Disease Registry (ATSDR) acknowledge that some children intentionally ingest soil -- a phenomena termed the PICA syndrome. The amount of soil ingested by a child with PICA syndrome is 1-2 orders of magnitude more than a non-PICA child.
98. The levels of EA2192 and VX in the CVXH, and available scientific information, support the conclusion that an incident or accident involving release of this CVXH and exposure of one or more Indiana or Texas residents, or residents of any of the affected states or interstate travelers, particularly children, would cause death or serious injury.
99. The threat of release of VX and EA2192 in an accident or during incineration is a very real danger, a danger more than sufficient to meet the standard under RCRA for an imminent and substantial endangerment of human health or the environment.
100. All of the paragraphs in the subsequent counts of this Complaint are hereby incorporated by reference.

COUNT 2: THE FEDERAL DEFENDANTS' ACTIONS ARE IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIREMENT TO CAREFULLY ASSESS ENVIRONMENTAL IMPACTS (THE "HARD LOOK" REQUIREMENT)

101. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.

102. The National Environmental Policy Act (NEPA) makes environmental protection a part of the mandate of every federal agency and department. *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C.Cir. 1971). NEPA requires agencies to *consider* environmental issues just as they consider other matters within their mandates. *Id.*
103. The Council on Environmental Quality ("CEQ") – an agency within the Executive Office of the President – has promulgated regulations implementing NEPA. See 40 C.F.R. §§ 1500-1508.
104. NEPA's essential purpose is to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. 40 C.F.R. § 1500.1 (c).
105. To accomplish its purpose, NEPA requires that all agencies of the federal government must prepare a detailed statement regarding all major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2) (c).
106. This statement, known as an Environmental Impact Statement ("EIS"), must describe (1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, (3) any alternatives to the proposed action, and (4) any irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented. *Id.*
107. "Major Federal actions" requiring preparation of an EIS include projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. 40 C.F.R. § 1508.18(a).

108. An agency may first prepare an environmental assessment (EA), a short concise document, to determine whether a proposed action may have significant environmental impacts and therefore require the preparation of an EIS.
109. Regulations promulgated by the CEQ to implement NEPA delineate some of the factors that must be considered in determining the significance of an action, including the following factors relevant to this case – any one of which alone could warrant production of an EIS:

. . .

(2) The degree to which the proposed action **affects public health or safety.**

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the **effects on the quality of the human environment are likely to be highly controversial.**

(5) The degree to which the **possible effects on the human environment are highly uncertain or involve unique or unknown risks.**

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

. . .

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical

under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b) (emphasis added).

110. An EIS, or at minimum an EA, must be produced for all major federal actions unless the project fits within a categorical exclusion under the agency's regulations because they have been determined to have no more than minimal environmental impacts.
111. Army regulations delineate actions that can be categorically excluded from NEPA and do not require the preparation of an EA or EIS. 32 C.F.R. § 651.11(c). Under Army regulations, actions that degrade the existing environment or are environmentally controversial or adversely affect environmentally sensitive resources will require an EA.
Id.
112. The transport and incineration of CVXH at issue does not qualify for a categorical exclusion due to obvious environmental impacts, scientific and public controversy and other factors. See e.g., 32 C.F.R. § 651.29(b); 32 C.F.R. § 651.29 (c).
113. 'Tiering' refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. § 1508.28.
114. An agency may prepare a broad environmental impact statement on a general program or policy decision, so that a subsequent site specific statement or environmental assessment

need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. 40 C.F.R. § 1502.20.

115. Agencies are encouraged to undertake NEPA analysis early in the planning process, therefore supplementation of an environmental impact statement may be necessary with the passage of time and changing conditions or knowledge. 40 C.F.R. § 1502.5(a).
116. Agencies are required to prepare a supplemental environmental impact statement if either:
 - 1) substantial changes to the project are proposed, or
 - 2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1).
117. Department of the Army regulations require that the project proponent initiate another 'hard look' to ascertain the adequacy of the previous analyses and documentation in light of changes to the project or significant new circumstances or information regarding environmental impacts of the project. 32 C.F.R. § 651.5(g)(2).
118. Supplemental environmental impact statements must go through the same process as the original documents, including scoping, i.e. notice to the public of the proposed action and request for relevant information and concerns before even a draft document is produced. 32 C.F.R. § 651.24. However, if the supplement is undertaken within one year of the original record of decision, then the scoping process does not need to be repeated. *Id.*
119. The Army's 1998 EIS did not specifically address the environmental impacts of transport of CVXH from Newport, Indiana to Port Arthur, Texas or the impacts of incinerating CVXH in Port Arthur.

120. The Army's 2002 NEPA Environmental Assessment (EA) almost exclusively addresses issues related to transportation of CVXH and potential impacts in the vicinity of Newport Chemical Depot in Indiana.
121. The Army in the 2002 EA recognizes that some impacts that would be avoided or reduced at Newport could be transferred to the locality of the yet to be selected disposal facility. However, the Army made explicit that individual treatment, storage, and disposal facility (TSDF) evaluation or a TSDF technology evaluation was beyond the scope of the 2002 EA.
122. The 2002 EA provided only generic and hypothetical descriptions of the off-site treatment process, without identifying any specific disposal site locations (or even regions).
123. This Army process is inadequate to comply with the NEPA requirement that there be an opportunity for public review and comment on the specific action proposed and selected, which in this case would include the specifics of the ultimate receiving location and actual treatment method to be used for treatment of the CVXH.
124. The 2002 EA contains only a cursory description of the general risk of traffic accidents in the transport of CVXH. The EA concludes simply that because of caustic and toxic properties of the VX hydrolysate, an accidental spill during transportation could cause disruption and possibly require evacuation.
125. The Army's 2002 NEPA Finding of No Significant Impact (FONSI), as with the 2002 EA on which the FONSI was based, focused on the off-site shipment of the CVXH without specifying a particular receiving facility that would treat the CVXH.
126. The Army in 2006 issued a revised FONSI that addresses alternative routes to the DuPont

facility in Deepwater, New Jersey. DuPont and the Army later announced that the DuPont facility would not be used for the treatment and disposal of CVXH.

127. The 2002 and 2006 FONSI and 2002 EA were based on the assumption that the CVXH would not contain any detectable amounts of agent VX.
128. The 2002 EA and FONSI were not site specific or treatment method specific, i.e. did not identify or analyze any particular location to which the CVXH would be shipped and treated nor any particular method of CVXH treatment that would be used.
129. The Dupont New Jersey facility planned to receive this CVXH stated in its own risk analysis that Dupont would not accept the CVXH if the CVXH contained any detectable amounts of agent VX.
130. The Army's NEPA FONSI and EA, and Dupont's own analysis, also assumed there would not be detectable amounts of EA 2192 in the CVXH.
131. The CVXH is contaminated by VX and EA2192 to the extent that off-site shipment would not be allowed under the Army's/CMA's own policies. It is Army policy to not allow off-site shipment of CVXH containing more than 20 ppb VX. This Army/CMA standard is being and will be violated by off-site shipment of the CVXH.
132. A significant risk of harm to public health and the environment could be posed by leaks, spills and accidents during transport of the CVXH.
133. Although an ecological risk assessment was prepared for the plan to treat the CVXH at the DuPont facility in New Jersey, no new ecological risk assessment has been performed by the Army or Veolia Environmental Services, and no such assessment has been reviewed by EPA, in regard to the Army's new decision to incinerate the CVXH at the

Veolia facility.

134. Because of the higher than expected levels of VX and EA2192 reported to have been found in the CVXH, and because of the potential for cross-contamination of a CVXH shipment with untreated VX, real ecological impact issues exist that should have been analyzed regarding the potential toxic and hazardous nature of the incineration emissions as well as the incineration secondary (residual) waste streams including ash and pollution abatement system wastes.
135. Any ecological assessment done must also address potential adverse impacts from the several metals present in the CVXH including arsenic, chromium, and lead, none of which are or can be destroyed by incineration.
136. The EPA has concluded that the Army's 20 ppb VX detection limit used for the CVXH is based solely on the protection of humans [soldiers, i.e. healthy adults] from a drinking water source and may not be protective of aquatic organisms through ingestion or dermal exposure.
137. EPA has reported that acute exposure studies of the VX nerve agent have been performed demonstrating that 7 out of 10 juvenile striped bass were killed after 14 to 20 hours of exposure to 20 ppb (the method detection limit) of VX nerve agent.
138. EPA has reported that all of the white perch (10 of 10) exposed to 25 ppb (slightly above the detection limit) of VX nerve agent in aqueous medium died in approximately 9 hours.
139. EPA noted that the authors of the white perch study of VX toxicity observed that the effects of chronic exposures to lower levels of VX have not been studied.
140. Army scientists have acknowledged that based on EA2192's persistence and toxicity,

several reports suggest that EA2192 be viewed as a serious consideration wherever VX is being destroyed.

141. Army scientists have acknowledged that EA2192 may pose a greater potential for chronic toxicity than VX, and once in solution, EA2192 is extremely persistent in the environment.
142. The Army's, DOD's and CMA's actions to transport the CVXH from Indiana to Texas and incinerate the CVXH in Texas are major federal actions.
143. The Army's, DOD's and CMA's actions to transport the CVXH from Indiana to Texas and incinerate the CVXH in Texas will have significant effects on the quality of the human environment.
144. Given the new information on EA2192 and VX levels found in the CVXH, the change in procedure to not treat the CVXH prior to shipment to lower the flammability, the new information that the CVXH transport containers are returning to Newport from Texas still containing 50 gallons of liquid which is presumably CVXH, the now known specific location to which the CVXH will be transported and at which the CVXH will be treated, the now known method of treatment of the CVXH, and the numerous health risk related factors stated *supra* in count 1, NEPA requires that a new EA and/or EIS, be prepared.
145. The Army has failed to analyze the numerous changes and examples of significant new information referenced above in any supplemental NEPA document.
146. In failing to consider the potential for violation of Federal law and International Treaties through the interstate shipment of partially treated chemical weapons munitions, the Defendants have acted in a manner that is arbitrary and capricious and otherwise not in

accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.

147. In failing to supplement the NEPA analyses undertaken for the project in light of substantial changes in the project and significant new information and circumstances pertaining to the environmental impacts of the proposed project, the Defendants have unreasonably delayed and unlawfully withheld supplementation of its outdated NEPA analysis and have acted in a manner that is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(1) and (2) and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq and implementing regulations.
148. In failing to take a hard look at the site specific environmental impacts of treatment and disposal of VX hydrolysate at the Port Arthur, Texas Veolia Environmental Services incineration facility, and at sensitive points along the route there from Newport, Indiana, in any environmental impact statement or environmental assessment, the Defendants have acted in a manner that is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.
149. The Federal Defendants' finding that the treatment and disposal of VX hydrolysate at the Port Arthur, Texas Veolia Environmental Services incineration facility, and transportation of the hazardous material from Newport, Indiana to the facility, in conjunction with past, present and reasonably foreseeable sources of degradation of the Port Arthur air quality and environment, will not have significant environmental impacts

is arbitrary, capricious, and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.

150. The Federal Defendants' transport and incineration of the CVXH prior to preparation of a new EA/EIS addressing all of the new information regarding environmental impacts referenced above is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.

COUNT 3: FEDERAL DEFENDANTS ARE IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIREMENT TO CAREFULLY ASSESS ALTERNATIVE ACTIONS

151. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.
152. Section 102(2)(E) of NEPA requires that every agency must also study, develop, and describe alternatives to recommended courses of action . 42 U.S.C. § 4332(2)(E).
153. The CEQ regulations describe the consideration of alternatives as the heart of the environmental impact statement. 40 C.F.R. § 1502.14.
154. The purpose of the requirement to consider alternatives is to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means. *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974).

155. No decision is more important than delimiting what these ‘reasonable alternatives’ are since one obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration. *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997).
156. The Army's 1998 EIS analyzed alternatives and based on this 1998 EIS the Army identified on-site destruction of CVXH using supercritical water oxidation (SCWO) as the preferred alternative.
157. In July 2002, the Army released a document entitled “Final Environmental Assessment: Accelerated Neutralization of Chemical Agent and Off-Site Shipment of Liquid Process Effluents at the Newport Chemical Agent Disposal Facility.” The 2002 EA analyzes and considers only two alternatives: the “no action” alternative (use of on-site SCWO) and the proposed action of accelerated destruction of VX and generic off-site disposal. No specific off-site disposal locations or methods are identified or analyzed.
158. The two key differences between the no-action and the accelerated neutralization alternatives are: (1) accelerated destruction would be achieved by using a manually operated Chemical Agent Transfer System (CHATS) instead of the robotically operated Ton Container Cleanout (TCC) line to open the [storage containers] and drain the VX; and (2) hydrolysate resulting from accelerated neutralization would be shipped off-site for disposal instead of using the on-site oxidation SCWO process.
159. The 2002 EA notes and then summarily eliminates based on cost concerns a potential third option of accelerated neutralization of VX nerve agent and construction of on-site storage for hydrolysate waste pending on-site SCWO or other treatment facility

development.

160. The 2002 EA does not provide any indication of the costs of a hydrolysate storage facility in relation to the overall costs of neutralization and disposal or in comparison to off-site transport and disposal.
161. Safer alternatives to off-site transport and disposal of the CVXH are available. The obvious available safer alternative is the one the Army previously selected – on-site treatment with supercritical water oxidation (SCWO). This alternative is available, feasible and safer than off-site transport to an incinerator.
162. Both the Army and concerned citizens have already approved on-site SCWO. On-site SCWO survived the scrutiny of a feasibility analysis of alternatives by citizens and the Army, including a NEPA analysis.
163. The Army prepared an EIS in 1998 which included an analysis that supported the Army record of decision selecting the two step process of chemical neutralization followed by on-site Supercritical Water Oxidation (SCWO) to destroy the VX agent at the Newport Chemical Depot and to treat the hydrolysate resulting from the neutralization.
164. Other local treatment and disposal alternatives in Indiana, the State in which the VX is currently stored, exist but have never been analyzed or considered in any NEPA document despite the fact that Federal law requires complete destruction of biological and chemical weapons stores within the State in which they are currently located.
165. If an updated alternatives analysis were performed by the Army, it would be expected to show that a number of available alternative treatment methods could be used to treat the CVXH at considerably less cost than under the Army contract with the Veolia

Environmental Services incineration facility, which is reported to involve unusually high costs.

166. In 2000, the National Research Council recommended evaluation of off-site management of hydrolysates both for potential cost and schedule benefits and as a contingency plan in case difficulties arise during the start-up and pilot testing of the on-site (post-neutralization) process steps.
167. In October 2000, a Post Treatment Alternatives Study was initiated to identify and evaluate on-site and off-site alternatives.
168. The alternatives study reviewed over 100 technologies in its Tier 1 preliminary identification phase, of which 42 were deemed suitable for Tier 2 preliminary screening.
169. Nine technologies passed the Tier 2 screen: solid wall (sw) SCWO, transpiring wall (tw) SCWO, UV/peroxide oxidation (UV/H₂O₂), wet air oxidation (WAO), electrochemical oxidation with Ag(II) (Silver IITM), molten salt oxidation (MSO), gas phase chemical reduction (GPCR), plasma arc, and biodegradation.
170. Tier 3 criteria included process efficacy, safety, and environmental impact.
171. Five (5) technologies emerged from the Tier 3 evaluation as technically viable alternatives for on-site treatment of hydrolysate, which were, in order of preference: sw-SCWO, tw-SCWO, UV/ H₂O₂, WAO, and Electrochemical Oxidation with Silver IITM.
172. The sw-SCWO technology received the highest ranking based on its proven effectiveness, safety, non-hazardous effluent characteristics, successful permitting history, and demonstrated ability to comply with all current Newport Chemical Depot environmental permits. The tw-SWCO technology was ranked behind sw-SCWO because it was

considered less developed and less demonstrated. Both UV/H₂O₂ and WAO were considered commercially available technologies with a successful permitting history for hazardous waste applications. These two technologies were considered less effective than SCWO, but potentially useful for pretreating the hydrolysate prior to shipment to a TSDF. Silver IITM was considered demonstrated to be almost as effective as SCWO technology at destroying the organic compounds in the hydrolysate, but less mature and more complex than the other alternatives.

173. The alternatives report also looked at off-site options and concluded that there was insufficient information to justify selecting the off-site options and that sw-SCWO remains the preferred technology alternative for the complete destruction of VX hydrolysate at NECDF. The alternatives report noted that results of the recently completed Engineering Scale Test program confirmed the technology's ability to effectively and safely destroy the hydrolysate and meet environmental permit performance requirements. The Parsons Report noted that temporary on-site storage of hydrolysate may be needed to mitigate the impact of delays in post-treatment operations on the agent neutralization schedule.
174. In the 2002 EA, the Army adopted the 1998 proposal as the "no action" or status quo alternative and proposed a single new alternative of accelerated partial neutralization combined with off-site disposal.
175. In the 2002 EA, the Army identifies a possible backup accelerated approach that would also allow accelerated neutralization through the on-site construction of an above-ground tank farm for storage of the hydrolysate to accommodate additional SCWO process

development. However, this alternative was summarily eliminated from consideration because the Army asserted that it would add cost and would delay disposal of the CVXH, despite the fact that it would meet the primary identified purpose and need of the proposed action by accelerating the elimination of the threat of terrorist attack on actual VX nerve agent stockpiles.

176. The Federal Defendants have failed to perform an updated NEPA analysis, through a supplemental EIS or EA as required by NEPA, of reasonable alternatives to their decision to transport CVXH from Indiana to Texas and incinerate the CVXH in the Veolia Environmental Services incinerator in Port Arthur, Texas in light of the disclosures by Newport Depot/NECDF employees that the CVXH contains higher than expected levels of highly toxic agent VX and EA2192, post-start-up incidents at NECDF that may have resulted in substantial VX contamination of the CVXH to be transported and incinerated, the recently disclosed history of leaks in the intermodal containers, the availability of CVXH treatment options within the State of Indiana, and other new information referenced herein bearing on environmental impacts and available alternative courses of action.
177. In failing to consider a full range of reasonable alternatives to the treatment and disposal of VX hydrolysate at the Port Arthur, Texas Veolia Environmental Services incineration facility in any new or supplemental environmental impact statement or environmental assessment based on the information currently available, the Defendants have acted in a manner that is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National

COUNT 4: THE FEDERAL DEFENDANTS HAVE FAILED TO ASSESS THE RISKS OF INTENTIONAL ACTS OF SABOTAGE AND TERRORISM AND THE ALTERNATIVES FOR MITIGATING SUCH RISKS, IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

178. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.
179. By eliminating the supercritical water oxidation of CVXH prior to shipment off-site in the proposed action, the Army will be transporting constituents of VX that could reconstitute to form VX under suitable conditions, such as a significant drop in pH.
180. One means by which a sufficiently significant pH drop could occur is by addition of a strong acid through deliberate action.
181. The Army's 2002 EA indicates that in the wake of the September 11, 2001 terrorist attacks, the Army determined that accelerating destruction of VX stockpiles is necessary to more quickly remove the risks of continued storage of VX (e.g., risks of VX releases caused by accidents, natural disasters, and acts of terrorism).
182. The Army's 2002 EA does not discuss or analyze the risks of intentional attack or hijacking of CVXH shipments, including the intentional and malicious addition of large quantities of acid to allow the reconstitution of VX.
183. The Federal Defendants have failed to address in any other NEPA documentation the risks of intentional attack or theft during transport, and contributory acts prior to transport, of the CVXH, rather than simply accidental releases.
184. Apart from the risk of an intentional act of a terrorist to use acid to reform VX in a tank

- once hijacked, the potential exists for the hijacking or bombing of a truck that has substantial amounts of VX already present in a tank being transported.
185. A 2005 CDC study acknowledged that at least one potential cross-contamination link, a three-way valve that controls flow of both hydrolysate and nerve agent, could result in agent VX reaching the CVXH holding tank after batch reactor sampling.
186. In the 2005 CDC study CDC estimates a 1 per 20,000 risk of unprocessed VX being shipped as a result of this cross-contamination link, and deems the probability low that cross-contamination and a transportation accident will coincide on the same shipment. But CDC does not consider the risk of cross-contamination either in the context of deliberate sabotage at the treatment facility or in the case of hijacking of a shipment.
187. Neither the CDC nor the Federal Defendants have adequately addressed another possibility for substantial amounts of VX to be present in the tanks being transported. During the start-up of the facility, several incidents occurred during which CVXH storage tanks were contaminated when manual tank valves were incorrectly operated or automatic valves failed to function correctly.
188. The Army asserts that no means currently exist for NECDF to resample the storage tanks to determine the impact of the contamination from these prior incidents resulting from failure or incorrect operation of valves.
189. The 2005 CDC Report does not explain how the Army and CDC can be confident that the incidents of contamination that occurred were only those incidents that the Army detected. In the absence of even the ability to test storage tanks to monitor for contamination, it is impossible for the Army and CDC to determine conclusively that the

thus far detected incidents of contamination were the only such incidents.

190. In the 2005 CDC report, CDC considers that a maximum credible event would involve a 5000-gallon tank truck or tote in an in-transit accident that ruptures the containment. CDC does not consider the consequences of an accident involving an explosion or fire, caused either by accidental or intentional means.
191. The potential for a fire during a release of CVXH, accidentally or otherwise, is significant. CVXH produced at NECDF exhibits the characteristic of flammability, with a flash point under 90°F.
192. Although the Army had planned to perform certain treatment steps at NECDF prior to shipment of the CVXH in order to reduce the flammability of the CVXH by raising the flashpoint of any CVXH shipments to greater than 140°F, it has been reported that the Army has recently decided to abandon those steps and is shipping the CVXH in the more flammable state.
193. The Army has not performed any analysis of the risk of an accidental or intentional explosion or fire during transport of the CVXH.
194. The risks and consequences for initial handling, incineration, and handling of incineration residual waste streams at the Veolia facility resulting from the potential cross-contamination of a CVXH shipment with untreated VX have not been analyzed or considered by the Federal Defendants or Veolia Environmental Services. These risks include the potential for access to pure VX by terrorists and domestic criminals.
195. The potential for malicious wrongdoing during the transport of CVXH in light of the higher than expected levels of VX and EA2192 in the CVXH, the potential for

reformation of VX if a strong acid is added to the CVXH, the possibility of cross contamination of the CVXH by VX as a result of past and future valve malfunction incidents (or intentional misconduct) is a particularly strong basis for requiring the conduct of a new EA and/or EIS given that the Army's primary rationale for changing the original plan for on-site treatment to hastened off-site treatment was the terrorist attacks of September 11, 2001.

196. In failing to consider potential non-accidental risks in the transport of VX hydrolysate from Newport, Indiana to the Port Arthur, Texas Veolia Environmental Services incineration facility in any environmental impact statement or environmental assessment, the Defendants have acted in a manner that is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.
197. The Federal Defendants' failure to identify and assess alternatives for mitigating the dangers of acts of domestic or international terrorism is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.

COUNT 5: FEDERAL DEFENDANTS HAVE FAILED TO ASSESS THE CUMULATIVE AND COMBINED IMPACTS OF THE ARMY'S PLANNED INCINERATION OF CVXH WITH MULTIPLE OTHER SOURCES OF AIR POLLUTION, INCLUDING IMPACTS ON MINORITY COMMUNITIES IN PORT ARTHUR, TEXAS, AND THE RESULTING VIOLATION OF FEDERAL ENVIRONMENTAL JUSTICE POLICIES, IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

198. As noted *supra*, regulations promulgated by the CEQ to implement NEPA delineate some

of the factors that must be considered in determining the significance of an action, including the following factors relevant to this count which warrant production of an EIS:
...

- (2) The degree to which the proposed action **affects public health or safety.**
- (3) Unique characteristics of the geographic area ...
- (4) The degree to which the **effects on the quality of the human environment are likely to be highly controversial.**
- (5) The degree to which the **possible effects on the human environment are highly uncertain or involve unique or unknown risks.**
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but **cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.** Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- . . .
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b) (emphasis added).

- 199. Defendants have failed to consider socio-economic and health impacts, including impacts on already highly polluted minority communities in Port Arthur, Texas, from the pollution resulting from the handling and incineration of CVXH combined with other area air pollution sources.
- 200. The 2002 Toxic Release Inventory (TRI) Data for Jefferson County, Texas including Port Arthur makes clear that Port Arthur and its surrounding area are already highly polluted. The 2002 TRI data shows the following toxic chemical air releases in pounds – Cancer

Causing Chemicals: 1,017,446; Reproductive Toxicants: 807,088; Developmental Toxicants: 1,647,210; Reproductive Toxicants: 5,773,970; Neurotoxicants: 8,977,547; Respiratory Toxicants: 10,871,052; Skin or Sense Organ Toxicants: 5,668,308; Immunotoxicants: 2,028,213; Kidney Toxicants: 3,495,495; Liver/Gastrointestinal Toxicants: 4,886,669; Carcinogens: 554,390; Cardiovascular/Blood Toxicants: 4,094,419; Developmental Toxicants: 4,648,722; Endocrine Toxicants: 933,178; and Musculoskeletal Toxicants: 862,569.

201. The following quantities of toxic chemical were reported as released to the air in Jefferson County, Texas in 2002 from stack and non-stack sources (in units of pounds per year) – Ethylene: 1,535,220 + 189,319; Propylene: 945,105 + 230,016; Sulfuric Acid: 776,537 + 1,951; Styrene 386,498 + 71,733; N-Hexane: 271,613 + 1,970,739; Benzene: 196,377 + 97,282; 1,3-Butadiene: 195,997 + 252,548; Toluene: 180,027 + 720,292; Ammonia: 168,109 + 310,554; Methanol 154,670 + 45,467; Chlorine: 129,358 + 3,573; and Xylenes: 92,009 + 69,429.
202. The following industries were reported to have released the indicated pounds of toxic chemicals to the air in Jefferson County in 2002 – Du Pont Beaumont Plant: 11,481,768; Exxon Mobil Beaumont Oil Refinery: 3,218,879; Motiva Enterprises L.L.C. Port Arthur: 2,337,511; Goodyear Tire & Rubber Co. Cheek: 2,219,943; BASF Fina Petrochemicals L.P. Port Arthur: 1,552,200; Huntsman (C4/O&O Facilities) Port Neches: 539,925; Mobil Chemical Polyethylene Plant Beaumont: 531,740; Huntsman Corp. (A& O Plant) Port Arthur: 513,477; Exxon Mobil (Mobil Chemical Co.) Beaumont: 500,398; Premcor Refinery Port Arthur: 397,092; Chevron Phillips Chemical Port Arthur: 380,494;

Ameripol Synpol Corp Port Neches: 300,598.

203. CEQ regulations define “cumulative impact” at 40 C.F.R. 1508.7. Cumulative impact is defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.
204. CEQ has emphasized the importance of considering cumulative impacts.
205. Evidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually "minor" effects of multiple actions over time.
206. CEQ has determined that unintended consequences on the human environment continue to occur from federal agency decision-making and that is largely attributable to this incremental cumulative impact.
207. The passage of time has only increased CEQ's conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment.
208. The purpose of cumulative effects analysis is to ensure that federal decisions consider the full range of consequences of actions.
209. Without incorporating cumulative effects into environmental planning and management, it will be impossible to move towards sustainable development, i.e., development that meets the needs of the present without compromising the ability of future generations to

meet their own needs.

210. The goal of cumulative effects analysis, like that of NEPA itself, is to inject environmental considerations into the planning process as early as needed to improve decisions. If cumulative effects become apparent as agency programs are being planned or as larger strategies and policies are developed then potential cumulative effects should be analyzed at that time.
211. In failing to consider the socio-economic and health impacts of pollution from the handling and incineration of the CVXH and the potential discharge of VX, toxic CVXH organic constituents such as EA2192, heavy metals, phosphorus and other pollutants to the Port Arthur, Texas environment from the Veolia Environmental Services incineration facility in any environmental impact statement or environmental assessment, the Defendants have acted in a manner that is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.

COUNT 6: ALL DEFENDANTS ARE IN VIOLATION OF INDIANA HAZARDOUS WASTE LAW GOVERNING THE TRANSPORT OF CHEMICAL WEAPONS

212. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.
213. Under Indiana law, the term chemical munition includes agent VX (O-ethyl-S-(2-diisopropylaminoethyl) methyl phosphonothiolate). I.C. § 13-11-2-25(6).
214. VX is an acute hazardous waste under Indiana law. 329 I.A.C. § 3.1-6-3.

215. Indiana law governing transport of chemical munitions requires the following:

[B]efore transporting a substance referred to in section 1 of this chapter, a person must coordinate the transport with the appropriate state agencies of each state through which the substance will be transported and file in Indiana the following with the department, state police department, and state emergency management agency:

(1) A written evaluation of potential transportation risks that:

(A) accounts for the type and quantity of hazardous waste to be transported;

(B) identifies the most likely types of incidents that could:

(I) occur during the transport; and

(ii) result in harm to the public health or environment;

(C) assesses the likelihood of the occurrence of each type of incident referred to in clause (B);

(D) identifies the magnitude of the potential harm to the public health or environment associated with each type of incident referred to in clause

(B); and (E) is written in a manner understandable to:

(I) the scientific community; and

(ii) the public.

(2) A written transport safety plan that:

(A) is tailored to the risks described in subdivision (1); ...

I.C. § 13-22-7.5-2.

216. These requirements have been violated by Defendants because they have based their risk assessment and transportation safety plan on inaccurate and/or false data regarding the levels of the highly toxic VX and EA2192 present in the CVXH.

217. The transport of the CVXH without a new thorough testing of the CVXH and revised risk assessment and transportation plan violates I.C. § 13-22-7.5-2.

218. Indiana hazardous waste law governing chemical weapons waste requires an appropriate emergency responder training plan for response to a chemical warfare agent waste release.

Destruction or treatment of certain chemical munitions;
monitoring; plan; inspection and oversight protocol.

Sec. 10. (a) In addition to any other requirements, a hazardous

waste facility that generates or treats a hazardous waste classified as I001 must demonstrate all of the following: ...

(3) That a plan to:

(A) provide sufficient training, coordination, and equipment for state and local emergency response personnel needed to respond to possible releases of harmful substances from the proposed hazardous waste facility; and

(B) evacuate persons in the geographic area at risk from the worst possible release of:

(I) the chemical munition; or

(ii) a substance related to the destruction or treatment of the chemical munition; from the proposed hazardous waste facility;

has been funded and developed.

I.C. § 13-22-3-10.

219. This requirement has been violated by Defendants due to their failure to accurately characterize the CVXH and report the results to emergency responders.

COUNT 7: ALL DEFENDANTS ARE IN VIOLATION OF RCRA HAZARDOUS WASTE CHARACTERIZATION REQUIREMENTS

220. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.

221. Federal, Indiana, Texas and other states' hazardous waste laws and regulations (RCRA programs) require that hazardous waste be adequately tested and the chemical contents determined (characterized) prior to transport, disposal or treatment. *See* 40 C.F.R. § 264.13. This regulatory provision requires that prior to transport or treatment of hazardous waste the owner and operator must obtain a detailed chemical and physical analysis of a representative sample of the waste. At a minimum, this analysis must

contain all of the information which must be known in order to treat, store and dispose of the waste in accordance with 40 C.F.R. Part 264 of the RCRA regulations (or the State counterparts of these regulations in States with federally delegated hazardous waste regulatory programs).

222. RCRA requires that an analysis of the hazardous waste must be repeated as often as necessary to ensure that the waste analysis information remains accurate and up to date. 40 C.F.R. § 264.13. If the facility owner or operator receives new information, or if they find based on an inspection, or if they have other reason to believe that the character of the waste has changed from the original analysis, then a new waste analysis must be performed. *Id.*
223. The high flammability was unexpected and its discovery establishes the potential for further surprises in the characteristics of the CVXH as it is produced and stored.
224. One other surprise to date was the discovery, noted by a CDC consultant, that VX concentrations in solid phases of CVXH contained up to 1 part per million of VX (compared to a clearance level of below 1 part per billion).
225. On the basis of good technical and operating practice, NECDF should have an additional method to allow representative sampling from storage tanks and shipping containers if there is concern that the sampler had not functioned correctly or to verify the CVXH characteristics have not changed due to long-term storage or possible contamination. Currently, according to the Army, if the material needs to be rechecked or verified, the only way to obtain a sample is to return the material to the reactor. Such action is a long and complex process that reduces the facility's available production capacity. No

downstream backup or verification is in place. CDC recommended that NECDF develop a plan to address this deficiency and operation of the system.

226. The CDC acknowledges that numerous risk issues have been and will continue to be identified as the plant moves toward full-scale processing. Examples of technical issues identified to date include a) the need to better match materials of construction used for valves and other components handling VX and CVXH, b) the need to eliminate the potential flammability characteristic from CVXH and still meet clearance criteria, and c) the need to improve sampling to provide a reliable and repeatable representative sample for shipping analysis.
227. The Army contract for CVXH incineration has been reported to provide for payment to Veolia Environmental Services of prices significantly higher than market prices for disposal of caustic wastes. This suggests that the Army knows that the CVXH contains the higher levels of VX and EA2192 alleged by Plaintiffs herein and is not simply caustic waste.
228. The new information that has been reported regarding higher than expected levels of VX and EA2192 in the CVXH, high flammability, high concentrations of VX in the solid phases of the CVXH, together with information regarding the incidents that occurred at NECDF after start-up of operations that may have cross-contaminated the CVXH with untreated VX as a result of valve malfunction or improper operation, and in light of the time the CVXH has been in storage which may have allowed reformation of VX and EA2192, requires Defendants under the applicable RCRA waste characterization requirements to thoroughly retest the CVXH prior to transport to ensure the waste

characterization has not substantially changed from that indicated by the prior testing.

229. Defendants failure to do this thorough retesting of the CVXH prior to transport and incineration of the CVXH is a violation of RCRA waste characterization requirements.

COUNT 8: ALL DEFENDANTS ARE IN VIOLATION OF THE INDIANA, TEXAS, OTHER STATES', AND FEDERAL RCRA REQUIREMENTS THAT ACCURATE HAZARDOUS WASTE MANIFESTS ACCOMPANY ALL SHIPMENTS OF HAZARDOUS WASTE

230. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.

231. Manifests that accurately state the contents of hazardous wastes to be transported, including all waste codes that apply to the contents, must accompany all shipments of hazardous wastes including chemical weapons waste. *See* I.C. §§ 13-22-4-1, 13-22-4-2; 40 C.F.R. §§ 262.20, 263.20.

232. It is prohibited by Indiana hazardous waste law, Texas hazardous waste law, and other States' hazardous waste laws, for a person to transport a hazardous waste without a manifest when a manifest is required. I.C. § 13-20-2-1(12).

233. Defendants have transported, are transporting, and intend to continue transporting via truck from Indiana to Texas hundreds of loads of CVXH without a manifest that accurately states all applicable hazardous waste codes and without a manifest that accurately reflects the hazardous waste contents of the intermodal containers carried on the trucks.

234. Consequently, Defendants are in violation of I.C. §§ 13-22-4-1, 13-22-4-2; 40 C.F.R. §§ 262.20, 263.20; and I.C. § 13-20-2-1(12), and the counterparts of these provisions under

Texas and other States' hazardous waste laws.

COUNT 9: ALL DEFENDANTS ARE IN VIOLATION OF THE INDIANA, TEXAS, OTHER STATES', AND FEDERAL RCRA REQUIREMENTS THAT OWNERS AND OPERATORS OF A HAZARDOUS WASTE FACILITY TAKE ALL NECESSARY MEASURES TO PREVENT AND MINIMIZE RELEASES OF HAZARDOUS WASTES AND HAZARDOUS WASTE CONSTITUENTS

235. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.
236. The federal, Indiana, Texas, and other States' RCRA programs require that hazardous waste facility owners and operators take all necessary measures to prevent and minimize releases of hazardous wastes to the environment, both during normal treatment, storage and disposal and during an accident, incident or emergency. *See* 40 C.F.R. §§ 264.31, 264.56(b), 264.56(e).
237. Given the history of the intermodal containers leaking, the Army, CMA and its contractors are, in continuing to store and ship the CVXH in these same intermodal containers, not taking all necessary measures to prevent and minimize releases of CVXH, a hazardous waste, and the hazardous waste constituents of the CVXH including VX and EA2192, to the environment.
238. In addition, once the CVXH arrives at the receiving facility, Veolia Environmental Services in Port Arthur, Texas, there is no capability such as Army ACAMS, minicams or Fourier Transform Infrared technology (FTIR), in place at the Veolia incineration facility to detect either the VX or EA2192 at any concentration in air.
239. There is no procedure in place at the Veolia facility to systematically sample and analyze

- the liquid CVXH for VX or EA2192 once it arrives at the Veolia facility.
240. Further, even if Veolia intended to monitor for EA2192 in air, there is no validated method available to do so.
241. Even for VX, the ACAMS and minicams have not been validated in an incineration combustion gas environment by EPA or a state environmental agency via the conduct of tests involving spiking known amounts of a chemical agent or surrogate into the stack gas and then determining the amount of that agent or surrogate actually detected by the ACAMS or minicams.
242. Army monitoring staff have reported that there is substantial reason to believe that if such a validation test were attempted, that the stack sampling system currently in use at Army facilities would fail to deliver an accurate sample to the ACAMS or other instrument attached to the sampling apparatus.
243. Army monitoring staff have reported that even if a stack gas sample were delivered via a sampling system to an ACAMS, that the amount of moisture and particulate in the stack gas could cause the ACAMS to malfunction.
244. Thus, if the Veolia incinerator fails to destroy the VX or EA2192 in the CVXH, and emits these compounds into the ambient air, there will be no capability in place to detect these releases, warn the public, or trigger response actions to minimize the damage including shutting down the CVXH feed.
245. There is reason to believe that residual or reformed VX in the CVXH will not be destroyed via the incineration process to a 99.9999% destruction and removal efficiency (six 9's DRE), or even to a 99.99% DRE (four 9's DRE). This poor DRE is due to a

poorly understood phenomenon, recognized in EPA and scientific reports, which in part may involve reformation in the stack gas. This phenomenon results in organic chemicals that are fed to an incinerator in low concentrations not being destroyed as well as organic chemicals fed at higher concentrations. Thus, even if the Veolia incinerator destroys other higher concentration hazardous wastes to the four or six 9's DRE level required by RCRA regulations, a substantial portion of the VX and EA2192 in the CVXH would be expected to be released to the environment undestroyed.

246. By failing to test the CVXH for EA2192 and VX content when it arrives at the Veolia incineration facility, and by failing install and operate an effective stack gas monitoring or ambient air monitoring system for EA2192 and VX, Defendant Veolia will not be able to determine the extent to which EA2192 or VX (or other contaminants in the CVXH) have been destroyed in the incineration process.
247. Consequently, by use of containers having a history of leaking CVXH, by use of an incineration treatment method expected to release at least a portion of the VX and EA2192 undestroyed in stack gas, and by not implementing an effective air monitoring system for VX and EA2192, Defendants have violated and continue to violate federal and state laws. The laws violated include the federal, Indiana, Texas, and other States' RCRA requirements, found at 40 C.F.R. §§ 264.31, 264.56(b), 264.56(e) and in the Indiana, Texas, and other States' regulations which correspond to these federal regulations. Defendants, for these reasons, have violated and are violating these federal and state requirements that hazardous waste facility owners and operators take all necessary measures to prevent and minimize releases of hazardous wastes and hazardous waste

constituents to the environment, both during normal treatment and during an accident, incident or emergency.

COUNT 10: ALL DEFENDANTS ARE IN VIOLATION OF THE CONGRESSIONAL BAN ON INTERSTATE TRANSPORT OF CHEMICAL WEAPONS

248. All of the paragraphs in the preceding and subsequent counts of this Complaint are hereby incorporated by reference.
249. Under the Defense Authorization Act of 1986 (DAA), 50 U.S.C. § 1512 et. seq., and Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (hereinafter "CWC"), the Secretary of Defense is required to destroy certain chemical munitions by 2007. 50 U.S.C. § 1521(b)(2).
250. The CWC contains an interim requirement to destroy 45% of stockpiles by 2004; the United States received an extension of this deadline until 2007 and will seek an extension of an additional five years to destroy all stockpiles as allowed by the CWC.
251. In undertaking the dismantling and disposal of the Nation's chemical weapons stockpiles, the DAA requires the Secretary to provide maximum protection for the environment and the general public. 50 U.S.C. § 1521(c)(1)(A).
252. The DAA states that the Secretary of Defense may not transport any chemical munition that constitutes part of the chemical weapons stockpile out of the State in which that munition is located on the date of the enactment of the Act (enacted Oct. 5, 1994) and, in the case of any such chemical munition not located in a State on the date of the enactment of the Act, may not transport any such munition into a State. 50 U.S.C. § 1512a(a).

253. The DAA further requires that in carrying out the required destruction of the Nation's chemical weapons stockpile the Secretary of Defense construct adequate and safe facilities designed solely for the destruction of lethal chemical agents and munitions. 50 U.S.C. § 1521(c)(1)(B).
254. Facilities constructed to carry out section 1521 may not be used for a purpose other than the destruction of the stockpile of lethal chemical agents and munitions that exists on November 8, 1985. 50 U.S.C. § 1521(c)(3)(A).
255. The DAA further provides that on and after the date of enactment of the Act (enacted Oct. 7, 1970), no chemical warfare agent shall be disposed of within or outside the United States unless such agent has been detoxified or made harmless to man and his environment unless immediate disposal is clearly necessary, in an emergency, to safeguard human life. 50 U.S.C. § 1518.
256. VX is a chemical munition under Indiana law, the DAA and under the CWC. *See* CWC; 50 U.S.C. § 1521(j); I.C. § 13-11-2-25(6).
257. EMPA (ethyl methyl phosphonic acid), MPA (methyl phosphonic acid), and thiolamine (diisopropylaminoethanethiol) are classified under the Chemical Weapons Convention as Schedule 2 compounds that could recombine to form VX under suitable conditions, most notably a lower pH than the highly caustic conditions at which CVXH is produced through hydrolysis.
258. Transport of CVXH with the reported levels of VX and EA2192, or even without these contaminants, is prohibited by federal law.
259. Defendants' transport of CVXH from the Newport Chemical Depot to Veolia

Environmental Services' incineration facility for incineration, because it involves the dangers identified *supra*, is not the safest alternative, and therefore does not provide for the maximum protection of the public health and the environment, is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and statutes governing the handling and destruction of the Nation's chemical weapons stores, 15 U.S.C. §§ 1512-1521.

260. In deciding to transport partially treated VX across State lines and to utilize a facility not constructed for the sole purpose of destroying chemical munitions to finalize destruction of the partially treated VX, Defendants have acted in a manner that is arbitrary and capricious and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) and statutes governing the handling and destruction of the Nation's chemical weapons stores, 15 U.S.C. §§ 1512-1521.

VI. PRAYER FOR RELIEF

WHEREFORE, as the Defendants have violated and threaten to violate federal and state RCRA requirements, federal NEPA requirements, and the congressional ban on interstate transport of chemical weapons, and have created imminent and substantial endangerments to the Plaintiffs' health, the general public's health, and the environment, the Plaintiffs respectfully request that the Court:

- 1) Issue a declaratory judgment that Defendants are in violation of the waste characterization requirements of the Resource Conservation and Recovery Act;
- 2) Issue a declaratory judgment that Defendants are in violation of the requirements of the

Resource Conservation and Recovery Act that mandate Defendants take all necessary measures to prevent and minimize releases of hazardous wastes and constituents;

3) Issue a declaratory judgment that Defendants are in violation of the requirements of the Indiana RCRA program hazardous waste law governing transport of chemical munitions;

4) Order the Defendants to pay civil penalties for each past and current violation of federal and State RCRA statutes and regulations;

5) Order the Defendants to properly characterize the CVXH waste to comply with RCRA;

6) Order the Defendants to take all necessary actions to prevent and minimize releases of VX, CVXH and CVXH toxic and hazardous constituents, including removing valves allowing cross contamination of CVXH with untreated VX, using containers that do not leak to store CVXH, and treating the CVXH on-site at Newport, Indiana rather than transporting the CVXH off-site;

7) Issue a declaratory judgment that Defendants' actions are contributing to an imminent and substantial endangerment of public health and the environment under RCRA;

8) Order the cessation of all actions by Defendants that are found to be contributing to such imminent and substantial endangerment of public health and the environment;

9) Order the Defendants to prepare a thorough Environmental Impact Statement regarding alternatives for CVXH disposal and their environmental impacts;

10) Issue a declaratory judgment that Defendants' decision that the proposed treatment and disposal of VX hydrolysate at the Port Arthur, Texas Veolia Environmental Services incineration facility, including transportation of the hazardous material from Newport, Indiana to the facility, in conjunction with past, present and reasonably foreseeable

sources of degradation of the Port Arthur air quality and environment, will not have significant environmental impacts is arbitrary, capricious, and otherwise not in accordance with law in violation of the Administrative Procedure Act, the National Environmental Policy Act and statutes governing the handling and destruction of the Nation's chemical weapons stores;

11) Issue a declaratory judgment that the environmental analyses prepared by the Defendants do not adequately describe, analyze and consider the full range of site specific impacts on the human environment, cumulative and secondary impacts, socio economic and environmental justice impacts, and a reasonable range of alternatives;

12) Issue a declaratory judgment that the Defendants' decision to ship partially treated VX hydrolysate across state lines is arbitrary, capricious, and otherwise not in accordance with law in violation of the Administrative Procedure Act and statutes governing the handling and destruction of the Nation's chemical weapons stores;

13) Issue an Order setting aside any findings or decisions by Defendants regarding the use of the Port Arthur, Texas Veolia Environmental Services incineration facility to treat and dispose of VX or VX hydrolysate;

14) Issue an Order enjoining Defendants from shipping any VX hydrolysate to the Port Arthur, Texas Veolia Environmental Services incineration facility or other off-site facility pending full compliance with the National Environmental Policy Act;

15) Retain continuing jurisdiction to review defendants' compliance with all judgments and Orders entered herein;

16) Award Plaintiffs' their costs of litigation, including reasonable attorney's fees and

expert fees; and

17) Award such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendants.

DATED: May 8, 2007

Respectfully submitted,

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CC: Service copies to EPA Administrator, Attorney General of the United States, and all Defendants.