



Permit condition I.A.6 is stayed “only as to the status of [the Tribes] as a co-permittee.”

Notification at 1. The Region advised that all other conditions of the Permit would take effect on December 1, 2018.

On November 14, 2018, Evoqua moved to remand the Notification or, in the alternative, to stay the Permit pending Board review. Evoqua Water Technologies LLC’s Motion to Remand EPA Notice of Stayed Permit Provisions or, in the Alternative, Motion to Stay Permit Pending Appeal (Nov. 14, 2018) (“Motion”). The Region opposed the Motion. The Tribes filed a notice of appearance but did not respond to the Motion. For the reasons set forth below, the Board requires further briefing from all parties (Evoqua, the Tribes, and the Region) before it can rule on the Motion.

In the Motion, Evoqua argues that the Region erred by staying only Permit condition I.A.6 in response to Evoqua’s challenge to the status of the Tribes as co-permittee. Motion at 4. It appears that Evoqua is arguing that the stay should extend to some 300 Permit conditions that refer to “Permittees” on the theory that Evoqua “constructively contested” those conditions and that they are not severable from condition I.A.6. *Id.* Evoqua contends that the stay should apply both to Evoqua and to the Tribes and requests that the Board either remand the Notification with instructions to stay the permit conditions listed in Attachment 2 as to both Evoqua and the Tribes or, in the alternative, stay the entire Permit. *Id.* at 7, Att. 2.

For its part, the Region appears to agree that the Permit – in its entirety – does not apply to the Tribes but objects to a stay of the Permit conditions listed in Attachment 2 or the entire Permit as to Evoqua based on Evoqua’s challenge to the Tribes’ status as co-permittee.

Response to Evoqua Water Technologies LLC’s Motion to Remand EPA Notice of Stayed

Permit Provisions or, in the Alternative, Motion to Stay Permit Pending Appeal at 2 (Nov. 29, 2018) (“Region’s Response”).

Under 40 C.F.R. § 124.19 – titled “Appeal of RCRA, UIC, NPDES and PSD Permits” – a person with standing may petition the Board for review of a “final permit decision issued under §124.15 of this part, or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under §270.29 of this chapter.” 40 C.F.R. § 124.19(a).

Once a petition for review has been filed, 40 C.F.R. § 124.16(a) provides that “the contested permit conditions shall be stayed” and “[u]ncontested conditions which are not severable from those contested shall be stayed together with the contested conditions.” Section 124.16(a) further provides that the Region “shall identify the stayed provisions of permits” and “notify the [Board], the applicant, and all other interested parties of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of the permit.” *Id.* § 124.16(a)(1), (2).

We note that 40 C.F.R. § 124.19(a) does not refer to decisions regarding the stay of permit conditions under 40 C.F.R. § 124.16(a), and nowhere else does Part 124 specifically address whether the Board may review such decisions. Further, in a recent filing with the Board in another case, Region 9 described decisions on stays of permit terms pending Board review – like a Region’s decision to withdraw some or all of a permit under 40 C.F.R. § 124.19(j) – as “wholly within the Region’s discretion.” Region 9 Reply to Pet’rs’ Resp. in Opp. to Mot. to Part. Dismiss Pet. & Establish Rev. Br. Schedule at 1 (filed in *In re Arizona Public Service Co.*, NPDES Appeal No. 18-02, Oct. 22, 2018). At the same time, 40 C.F.R. § 124.19(n) provides that the Board “may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal.”

Accordingly, the Board directs Evoqua, the Tribes, and the Region to file supplemental briefs answering all three of the following questions:


1. May the Board review a Region's notification of a stay of permit conditions issued pursuant to 40 C.F.R. § 124.16(a)?
2. If the Board may review a Region's notification, what is the appropriate standard of review?
3. If the Board may not review a Region's notification, what other recourse, if any, does a party have to challenge the notification?

Supplemental briefs shall be filed on or before **January 8, 2019**. The Region is directed to confer with the EPA's Office of General Counsel to ensure that the Region's responses to these questions reflect the Agency's views. In accordance with 40 C.F.R. § 124.19(f)(2), the parties are further directed to meet and confer in advance of their filings to narrow their areas of disagreement or resolve, if possible, the issues raised by the Motion and report to the Board in their supplemental briefs on the outcome of their meet and confer efforts.

So ordered.

**ENVIRONMENTAL APPEALS BOARD**

Date: December 14, 2018

By:   
Mary Beth Ward  
Environmental Appeals Judge

**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing ORDER FOR FURTHER BRIEFING ON EVOQUA'S MOTION FOR STAY OF PERMIT PROVISIONS PENDING BOARD REVIEW in the matter of *Evoqua Water Technologies LLC*, RCRA Appeal No. 18-01, were sent to the following persons by email:

***Counsel for EPA Region 9***

Mimi Newton  
Assistant Regional Counsel (ORC-3-2)  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105  
Tel: 415-972-3941  
Fax: 415-3570  
Newton.Mimi@epa.gov

Marie Rongone  
Section Chief (ORC-3-2)  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105  
Tel: 415-972-3941  
Fax: 415-3570  
Rongone.marie@epa.gov

***Counsel for Evoqua Water Technologies LLC***

Stephen M. Richmond  
BEVERIDGE & DIAMOND, PC  
155 Federal Street, Suite 1600  
Boston, MA 02110  
Tel: 617-419-2310  
Fax: 617-419-2301  
srichmond@bdaw.com

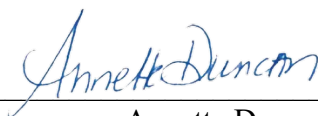
Bryan J. Moore  
BEVERIDGE & DIAMOND  
98 San Jacinto Blvd., Suite 1420  
Austin, TX 78701-4296  
Tel: 512-391-8030  
Fax: 512-391-8099  
bmoore@bdlaw.com

***Counsel for Colorado River Indian Tribes***

Sara A. Clark  
Rica Garcia  
Shute, Mihaly & Weinberger LLP  
396 Hayes Street  
San Francisco, CA 94102  
Tel: 415-552-7272  
Fax: 415-552-5816  
clark@smwlaw.com  
rgarcia@smwlaw.com

Rebecca A. Loudbear  
Antoinette Flora  
Office of the Attorney General  
Colorado River Indian Tribes  
26600 Mohave Road  
Parker, AZ 85344  
Tel: 928-669-1271  
Fax: 928-669-5675  
rloudbear@critdoj.com  
aflora@critdoj.com

Date: December 14, 2018



---

Annette Duncan  
Administrative Specialist