

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC**

In re Final RCRA Permit for)	
Evoqua Water Technologies LLC and)	
Colorado River Indian Tribes)	RCRA Appeal No. RCRA 18-01
2523 Mutahar Street)	
Parker, Arizona 85344)	
)	
EPA RCRA ID No. AZD982441263)	

**EVOQUA WATER TECHNOLOGIES LLC’S
PARTIAL RESPONSE TO REGION IX’S POST-HEARING BRIEF**

Petitioner, Evoqua Water Technologies LLC (“*Evoqua*”), responds as follows to EPA Region IX’s (the “*Region’s*”) April 16 post-hearing brief addressing the second and third questions presented by the Environmental Appeals Board (the “*Board*”) at the close of the April 9 oral argument in this matter. By joint motion filed separately today, Evoqua and the Colorado River Indian Tribes (“*CRIT*”) have requested an extension to May 13 to respond to the Region’s brief with respect to the Board’s first question (i.e., *Does the Permit require both Permittees to sign requests for modifications of the Permit?*).

Question 2: *Which of the Permit conditions that were challenged by the Petitioner – due to the Region’s application of requirements that were based on or refer to the MACT EEE standards to the facility’s carbon regeneration unit – involved “no specific comment or objection [being] raised during the public comment period by the Petitioner”?*

Evoqua responds to the Region’s post-hearing brief on this question only with respect to the Region’s characterization of Evoqua’s MACT EEE objections to the five permit conditions at issue. The Region characterizes Evoqua’s MACT EEE comments as “general objections,” as opposed to “specific or substantive objections.” Region’s Post-Hearing Brief at 3, 4, 5. Evoqua takes issue with the Region’s characterization to the extent that it is intended to imply that

Evoqua’s comments on these permit conditions did not meet the minimum requirements of 40 C.F.R. § 124.13, or that Evoqua did not otherwise preserve its MACT EEE objections for appeal. Evoqua maintains that it raised “all reasonably ascertainable issues” and submitted “all reasonably available arguments” supporting its position on the MACT EEE issue. 40 C.F.R. § 124.13.¹

Evoqua’s MACT EEE comments on the draft permit were sufficiently “specific” or “substantive,” or were otherwise not too “general,” to put the Region on notice of the full scope and extent of Evoqua’s objections to the Region’s use and application of the MACT EEE requirements, as evidenced by the Region’s responses to Evoqua’s MACT EEE comments. *See* Region’s Responses to Public Comments at 66-69 (responding broadly regarding the Region’s use and application of MACT EEE standards without any reference to specific permit conditions); *In re City of Phoenix*, 9 E.A.D. 515, 526 (EAB 2000) (“[T]he broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final.”); *cf. In re New England Plating Co.*, 9 E.A.D. 726, 732-33 (EAB 2001) (“In limited circumstances, this Board has considered the merits of an issue not specifically raised in comments below where the specific issue raised in the petition is very closely related to challenges raised during the comment period, and the Region had the opportunity to address the concerns in its response to comments. . . . The doctrine helps guard against a hypertechnical approach to issue preservation while simultaneously furthering the important principle that the Region, as a practical matter, first have an opportunity to consider the

¹ *See also id.* § 124.19(a)(4)(ii). Evoqua maintains that each MACT EEE issue raised in its petition was raised during the public comment period to the extent required by § 124.13.

issue.”) (citing *In re Ecoeléctrica, L.P.*, 7 E.A.D. 56, 64 n.9 (EAB 1997); *In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 257 n.5 (EAB 1995)).

Question 3: *Where in the Administrative Record are references to the relevant updates to the toxicity criteria or air dispersion modeling for Risk Assessments?*

While the Board did not request a response from Evoqua to the Region’s post-hearing brief on this question, Evoqua respectfully requests the opportunity to respond because the Region’s brief has brought to light a significant omission from the administrative record that is directly relevant to this risk assessment issue. Specifically, on May 15, 2014, the Region commented on Evoqua’s permit application and requested “additional information to supplement the information previously submitted.” Admin. Rec. Doc. No. 1247.² By email dated July 21, 2014, Evoqua responded to the Region’s comments and request for additional information. *See* Admin. Rec. Doc. No. 1250.³ However, while a copy of Evoqua’s cover email is included in the administrative record, one of the two attachments to that email appears to have been omitted from the record.⁴

The attachment at issue included Evoqua’s substantive responses to the Region’s May 2014 comments and request for additional information. Those responses (i.e., the entire missing attachment) are provided as ***Attachment A*** to this brief and should be included in the “supporting file for the permit” and, therefore, in the administrative record. 40 C.F.R. §§ 124.9(5), 124.18(6). Accordingly, Evoqua respectfully requests that the administrative record be supplemented with its July 21, 2014 responses to the Region’s May 2014 comments and request for additional information.

² “2014 05 15 Letter re Completion of April 2012 Application Review.pdf.”

³ “2014 07 21 Transmittal of RTC and Section L.pdf.”

⁴ *See* “Description” column for Admin. Rec. Doc. No. 1250 (“Email transmitting 2014 07 Response to Comments on April 2012 App and 2014 07 RCRA Application_Section L_Rev 2.”).

Certain of the Region's May 2014 comments – specifically, Comments 8, 9, and 10 – concerned the 2008 risk assessment that Evoqua conducted. Evoqua responded to each of these comments and included with its responses a memo prepared by Evoqua's risk assessment consultant. As set forth in Evoqua's response to the Region's Comment 8, and more fully in the attached consultant memo, at the Region's request, the top ten "risk-drivers" of the contaminants of potential concern from the 2008 risk assessment were re-examined in 2014 to confirm whether EPA had updated the toxicity criteria for any of these compounds since the last time that analysis was performed. And, to the extent that the EPA toxicity criteria for any of these "risk-driver" compounds had changed, the 2008 risk assessment was updated to reflect and capture these changes.

The "risk-driver" compounds were identified from the risk assessment results for both stack and fugitive emissions. Note that the total number of compounds associated with each – stack and fugitive emissions – was greater than ten because the top ten "risk-drivers" were identified for each of several different receptors and health endpoints and then combined to create a cumulative compound list for which toxicity criteria were updated and re-evaluated. A total of 38 "risk-driver" compounds were reassessed in the 2014 risk assessment update. For each of these compounds, the toxicity criteria used in the 2008 risk assessment were compared to the toxicity criteria available at the time of the 2014 update. The 2008 risk assessment results for both stack and fugitive emissions for the receptors with the highest risk results were updated to incorporate the revised toxicity criteria. As with the 2008 risk assessment, the 2014 revised risk assessment results were all below EPA's benchmark cancer and non-cancer risk levels.

In its post-hearing brief, the Region states that, "since the original 2007-2008 risk assessment," the toxicity criteria for some 33 compounds "have been updated, modified, reviewed

(or scheduled for review).” Region’s Post-Hearing Brief at 7-8. However, per the Region’s May 2014 request, Evoqua identified the top “risk-drivers” for the facility and updated its risk assessment in 2014 to address those compounds. Some of the 33 compounds identified in the Region’s post-hearing brief were included in this 2014 risk assessment update, but many of these 33 compounds were not among the compounds that Evoqua reassessed in 2014 because they were not among the top “risk-drivers” of the contaminants of potential concern that the Region requested to be re-evaluated. It is not clear from the Region’s brief whether the toxicity criteria for the remaining compounds reflect any appreciable risk at the Evoqua facility, nor do we know if any of the toxicity criteria for the 33 compounds have actually been revised since the 2014 update to the Evoqua risk assessment.⁵

The Region’s May 2014 comments on the 2008 risk assessment are instructive in that the Region’s requested risk assessment update was focused on, and limited to, only those developments post-2008 that had the *potential* to result in meaningful changes to the risk assessment results – e.g., revised toxicity criteria for the top ten “risk-driver” compounds (Comment 8); changes to the location of sensitive subgroups of receptors down-gradient from the facility (Comment 9); and modified facility processes, procedures, or waste streams

⁵ Additionally, as the Region acknowledges, there was a second update in 2014 to Evoqua’s risk assessment to assess further emissions of trichloroethylene (TCE). *See* Region’s Response to Evoqua’s Petition for Review at 29 (“Because of these changes in the Agency’s view of TCE toxicity, the Region requested an update to the 2008 HHERA prepared for the Facility to ensure that potential exposure to TCE releases at the Facility do not result in an unacceptable health impact.”); *see also* Admin. Rec. Doc. No. 1272 (“2014 10 21 Email Transmitting Memo re TCE Ambient air concentrations.pdf”). Trichloroethylene was also re-evaluated in the earlier 2014 risk assessment update as a “risk-driver” compound in the facility’s fugitive emissions. Nevertheless, trichloroethylene is included among the 33 compounds listed in the Region’s post-hearing brief. *See* Region’s Post-Hearing Brief at 8. Here again, it is not clear from the Region’s brief whether the toxicity criteria for trichloroethylene have been revised since the 2014 updates to the Evoqua risk assessment; the Region states only that the “toxicity criteria have been updated, modified, reviewed (or scheduled for review) since the original 2007-2008 risk assessment.” *Id.* at 7.

(Comment 10). Also, despite EPA having changed its preferred air dispersion model to AERMOD effective December 9, 2006, the Region did not require Evoqua to use this model in its 2008 risk assessment, or to re-run its risk assessment in 2014 using AERMOD.

Date: April 23, 2019

Respectfully submitted,

/s/ Bryan J. Moore

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Evoqua Water Technologies LLC's Partial Response to Region IX's Post-Hearing Brief has been served on the following parties via the following method on this 23rd day of April 2019:

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