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 2523 Mutahar Street Parker, Arizona 85344 EPA RCRA ID No. AZD982441263	)	RCRA Appeal No. RCRA 18-01

EVOQUA WATER TECHNOLOGIES LLC'S REPLY TO EPA'S RESPONSE TO MOTION TO REMAND EPA NOTICE OF STAYED PERMIT PROVISIONS OR, IN THE ALTERNATIVE, MOTION TO STAY PERMIT PENDING APPEAL

Per 40 C.F.R. § 124.19(f)(4), Petitioner, Evoqua Water Technologies LLC ("***Evoqua***"), respectfully submits the following points in reply to EPA's response to the above-referenced pending motion[1]:

- EPA's position that Evoqua was required to contest all non-severable permit conditions or otherwise identify them in its petition is directly at odds with the applicable regulatory requirements. 40 C.F.R. § 124.16(a)(2)(i) provides: "***Uncontested conditions*** which are not severable from those contested ***shall be stayed*** together with the contested conditions."[2] Furthermore, the regulations place the burden squarely upon EPA – not Evoqua – to identify the uncontested, non-severable permit conditions that shall be stayed: "The Regional Administrator ***shall identify*** the stayed provisions

[1] 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).

[2] 40 C.F.R. § 124.16(a)(2)(i) (emphasis added).

of permits . . . ."[3] Accordingly, the requisite stay extends beyond the specifically contested permit conditions to all permit conditions that cannot be severed from the contested provisions, and EPA has a non-discretionary duty to identify ***all*** of the permit conditions that shall be stayed, regardless of whether those conditions were specifically contested or are incapable of being severed from one or more contested conditions.

- EPA proposes a nonsensical test for severability, claiming that, simply because contested permit condition I.A.6 provides that compliance by either of the named Permittees is sufficient, condition I.A.6 is somehow severable from all other conditions in the permit. Contrary to EPA's proposal, here, with respect to contested permit condition I.A.6, the test for severability is a clear, common sense one. If only condition I.A.6 is severed from the permit, and "only as to the status of the tribal government landowner as co-permittee" as proposed in EPA's Notification, then that leaves a permit that still expressly defines the term "Permittees" to include both Evoqua and the Colorado River Indian Tribes ("***CRIT***")[4] and – in 329 separate permit conditions – still expressly imposes requirements on those defined "Permittees." The true, straightforward test for severability is whether EPA would have to revise any permit conditions other than condition I.A.6 if Evoqua prevails on its appeal of the co-permittee status of CRIT.

  As set forth in Evoqua's motion, EPA cannot cure the co-permittee error by merely revising only condition I.A.6 and "only as to the status of the tribal government landowner as co-permittee." It is indisputable that the appropriate remedy for Evoqua's successful challenge to the co-permittee status of CRIT would be to revise "Permittees" to "Permittee" in not only final permit condition I.A.6, but also in every one of 329 conditions in the permit that impose requirements and compliance obligations on both Evoqua and CRIT jointly as "Permittees."[5] Indeed, in its response to Evoqua's motion,

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[3] *Id.* (emphasis added).

[4] *See* Admin. R. Doc. No. 1609, z_2018 09 Evoqua Final RCRA Permit Modules I-VI.pdf, Final RCRA Permit for Colorado River Indian Tribes and Evoqua Water Technologies LLC, Module I, Permit Condition I.D, at 5 (defining "Permittees" to mean both Evoqua and CRIT).

[5] EPA would also have to revise the definition of "Permittee" in permit condition I.D. *See supra* note 4.

EPA does not contest that this would be the requisite "fix" if Evoqua prevails on the co-permittee issue.

- EPA misconstrues Evoqua's discussion of the *Upper Blackstone* case[6] in its motion. Evoqua does not cite *Upper Blackstone* to support the merits of its appeal of the co-permittee status of CRIT. Rather, as articulated in Evoqua's motion, *Upper Blackstone* demonstrates that when EPA eliminates a co-permittee provision from a permit, EPA does not merely delete the reference to the listed co-permittees in a single condition or provision of the permit, but rather deletes all references to co-permittees (i.e., "Permittees") in every condition throughout the permit. This approach unequivocally demonstrates that EPA recognizes that all co-permittee references in permits have meaning and are not severable from the first listing in the permit of the co-permittees by name. Regardless of EPA's reasoning in *Upper Blackstone* for reversing its position on the co-permittee issue and issuing a final permit that listed only a single permitee, when EPA decided on that approach, the agency implemented it by "remov[ing] from the Permit all language that previously identified . . . 'co-permittees' and all language that previously imposed requirements on those co-permittees. . . . No reference to 'co-permittees' remain[ed] in the Permit after [EPA] made these changes."[7]

PRAYER

For the foregoing reasons, and those more fully set forth in Evoqua's pending motion, Evoqua respectfully requests that the Board remand the challenged Notification to EPA with instructions to stay the permit conditions listed in ***Attachment 2*** to Evoqua's motion or, in the alternative, that the Board stay the permit in its entirety pending the final resolution of Evoqua's permit appeal. Because all permit conditions not identified as stayed in EPA's Notification are now fully effective and enforceable by operation of the applicable regulations,[8] Evoqua

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6 *In re Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297 (EAB 2011).

7 *Id.* at 305.

8 *See* 40 C.F.R. § 124.16(a)(2)(i).

respectfully re-urges its request that the EAB decide this motion and enter the requested order on an expedited basis.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Undersigned counsel for Evoqua hereby certifies that this reply complies with the word limit of 40 C.F.R. § 124.19(f)(5) because this reply contains 859 words.

Date: December 6, 2018

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 reply has been served on the following parties via the following method on this 6th day of December 2018:

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