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

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

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


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## I.
## INTRODUCTION

Per 40 C.F.R. § 124.19(f), Petitioner, Evoqua Water Technologies LLC ("***Evoqua***"), hereby moves for expedited entry of an order remanding the U.S. Environmental Protection Agency's ("***EPA's***") notice of stayed permit provisions or, in the alternative, an order staying Evoqua's permit in its entirety pending the final resolution of Evoqua's permit appeal. EPA's notice does not comply with 40 C.F.R. § 124.16(a) because it fails to stay all contested permit conditions and all "[u]ncontested conditions which are not severable from those contested."[1]

## II.
## FACTUAL AND REGULATORY BACKGROUND

On October 25, 2015, Evoqua filed its petition for review of the Resource Conservation and Recovery Act ("***RCRA***") final permit decision that EPA Region IX issued on September 25, 2018, concerning the existing carbon regeneration facility located in Parker, Arizona (the "***Facility***"), and operated by Evoqua.[2] Among other contested permit conditions, Evoqua's petition contested the identification of both Evoqua and the Colorado River Indian Tribes ("***CRIT***") as "Permittees" in final permit condition I.A.6 and throughout the permit.[3] Evoqua maintains, consistent with its petition, that CRIT should not be identified in the permit as a co-permittee (i.e., as a "Permittee") with joint responsibility for implementing and complying with the permit.

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1 40 C.F.R. § 124.16(a)(1)-(2)(i).

2 Evoqua Water Technologies LLC's Petition for Review (Oct. 25, 2018) [hereinafter "Evoqua Petition"].

3 *See id.* at 5-8.

Evoqua's appeal of the co-permittee language implicated not only condition I.A.6, but all other conditions in the permit that "identif[y] the 'Permittees' as responsible for essentially all of the permit requirements."[4] Evoqua challenged EPA's position that CRIT is required to be a co-permittee because it would require CRIT "to meet every operational condition of EPA's RCRA permit."[5] Evoqua's appeal of the co-permittee status of CRIT is consistent with Evoqua's comments on the draft permit "that EPA should not 'issue a permit that treats [Evoqua] and CRIT as co-equal permit holders and that identifies in every section that the 'Permittees' are responsible for individual compliance activities.'"[6]

The filing of Evoqua's petition triggered the non-discretionary stay provisions of 40 C.F.R. § 124.16(a). Per § 124.16(a)(1): "If a request for review of a RCRA . . . permit under §124.19 of this part is filed, the effect of the contested permit conditions ***shall be stayed*** and shall not be subject to judicial review pending final agency action."[7] Further, § 124.16(a)(2)(i) provides: "Uncontested conditions which are not severable from those contested ***shall be stayed*** together with the contested conditions."[8] Consistent with these non-discretionary stay provisions, EPA has a concomitant non-discretionary duty under § 124.16(a)(2)(i) to identify the stayed permit provisions: "The Regional Administrator ***shall identify*** the stayed provisions of permits."[9]

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4 *Id.* at 5.

5 *Id.* at 6-7; *see also id.* at 7 (specifically citing Permit Condition I.K and arguing that "EPA's co-permittee interpretation forces CRIT to undertake the onerous task of reviewing and signing every application as an applicant"); *id.* at 7-8 ("The permit should also reflect that Evoqua is solely responsible for the submittal and signing of the numerous permit modification applications required by the permit, particularly those applications required by the provisions of Condition I.K.").

6 *Id.* at 5.

7 40 C.F.R. § 124.16(a)(1) (emphasis added).

8 *Id.* § 124.16(a)(2)(i) (emphasis added).

9 *Id.* (emphasis added).

EPA is also required to issue notice "of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of the permit" 30 days after the date of the notice.[10] EPA issued the required notice on November 1, 2018, identifying stayed provisions of Evoqua's permit (the "***Notification***").[11] The Notification identifies final permit condition I.A.6 as among the stayed permit provisions, but "only as to the status of the tribal government landowner as co-permittee."[12] The Notification does not identify any other permit conditions that have been stayed in light of the contested co-permittee provision in condition I.A.6. Presumably, EPA determined (incorrectly) that Evoqua contested only final permit condition I.A.6 and that all other conditions of the permit are severable from the contested co-permittee provision in condition I.A.6.

## III.
## ARGUMENT

The Notification is deficient and unlawful because it fails to stay all contested permit conditions and all permit "conditions which are not severable from" contested permit condition I.A.6.[13] "Permittees" is a defined term in the permit – defined to refer to both Evoqua and CRIT.[14] As noted in Evoqua's petition, consistent with contested permit condition I.A.6, the permit

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10 *Id.* § 124.16(a)(2)(ii).

11 United States Environmental Protection Agency, Region IX, NOTIFICATION Regarding Effect of Petition for Review on [E]ffective [D]ate of Final RCRA Permit for Evoqua Water Technologies, LLC and the Colorado River Indian Tribes, Parker, AZ, EPA ID No.: AZD982441263 (Nov. 1, 2018) [hereinafter the "Notification"]. A copy of the Notification is attached as ***Attachment 1*** to this motion.

12 *Id.* at 2.

13 40 C.F.R. § 124.16(a)(1)-(2)(i).

14 *See* Admin. R., 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).

identifies the "Permittees" as responsible for essentially all of the permit requirements.[15] A search of the permit for reference to "Permittees" yields 329 permit conditions that impose requirements expressly on the "Permittees." ***Attachment 2*** to this motion lists all of these permit conditions.

The permit conditions that impose requirements expressly on the "Permittees" were constructively contested by Evoqua and are not severable from the contested co-permittee provision in condition I.A.6. These permit conditions must be stayed. EPA's failure to stay these contested, non-severable permit conditions in the Notification is "clearly erroneous."[16] While Evoqua maintains, as set forth above, that EPA's duty to stay these contested, non-severable permit conditions is non-discretionary, to the extent that EPA has any discretion to exercise here, the agency's exercise of that discretion was arbitrary and capricious and should be reviewed and remanded.[17]

This is not the first time that EPA has addressed co-permittee issues on appeal of a permit. In *Upper Blackstone Water Pollution Abatement District* ("***Upper Blackstone***"), EPA identified "co-permittees" in the permit and "extended standard permit conditions governing operation, maintenance, and reporting" to the identified co-permittees.[18] The Environmental Appeals Board ("***EAB***" or the "***Board***") remanded the permit "provisions imposing permit conditions on the identified co-permittees" "after concluding that [EPA] had not adequately explained the legal basis for its decision."[19] "The Board stated that '[o]n remand, [EPA] may re-issue the Permit with, or

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15 *See* Evoqua Petition, *supra* note 2, at 5.

16 40 C.F.R. § 124.19(a)(4)(i)(A).

17 *See id.* § 124.19(a)(4)(i)(B).

18 *In re Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297, 298 (EAB 2011) [hereinafter "*Upper Blackstone II*"]; *see also id.* at 304 (same).

19 *Id.* at 298, 304; *see also In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 585-91 (EAB 2010) [hereinafter "*Upper Blackstone I*"].

without, the co-permittee provision as the [EPA] determines is appropriate.'"[20] "The Board also stated that if [EPA] decide[d] to issue the permit with the co-permittee provision, [EPA] must correct its previous failure to 'sufficiently articulate[] in the record of this proceeding a rule-of-decision, or interpretation, identifying the statutory and regulatory basis'" for the co-permittee provision.[21]

On remand in the *Upper Blackstone* case, EPA removed all references to co-permittees in the permit,[22] which unequivocally demonstrates that EPA recognizes that co-permittee references in permits have meaning and are not severable from the first listing in the permit of the co-permittees by name. In other words, on remand in the *Upper Blackstone* case, EPA did not just merely delete the reference to the listed co-permittees on the first page of the permit (i.e., "the statement in the Permit's first paragraph identifying" the co-permittees by name), but rather deleted all references to co-permittees in every condition throughout the permit.[23] The agency's approach – which was the correct approach to remove the contested co-permittee provision – evidences that co-permittee references in permit conditions are neither meaningless nor severable. EPA severed the co-permittee provisions from the permit because they were directly related to the

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[20] *Upper Blackstone II*, *supra* note 18, 15 E.A.D. 298 (quoting *Upper Blackstone I*, *supra* note 19, 14 E.A.D. at 591).

[21] *Id.* (quoting *Upper Blackstone I*, *supra* note 19, 14 E.A.D. at 589-90).

[22] *See id.* at 297, 298-99, 304 (noting that EPA "issued its final permit decision . . ., redacting all references in the Permit to co-permittees"); *see also id.* at 303 ("The 'extent of changes' in the present case is defined by [EPA's] decision to 'forego imposition of any co-permittee requirements' and to issue the final permit . . . without . . . co-permittees."); *id.* ("In the present proceeding, . . . [EPA] removed the Permit conditions imposing co-permittee requirements . . . ."); *id.* at 305 ("[EPA] removed 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' remains in the Permit after [EPA] made these changes.").

[23] *Id.* at 305 ("[EPA] removed 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' remains in the Permit after [EPA] made these changes.").

contested first-page listing of the co-permittees by name and, if the co-permittee provisions remained in the final permit, they would render the final permit confusing, at the very least, and may potentially present compliance and enforcement issues. The same is true of the Evoqua permit.

If Evoqua prevails on its appeal of the co-permittee status of CRIT, then EPA cannot cure the error by merely revising only condition I.A.6 and "only as to the status of the tribal government landowner as co-permittee," as EPA has signaled in the Notification. 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 the numerous conditions in the permit that impose requirements and compliance obligations on both Evoqua and CRIT jointly as "Permittees." The requisite "fix" would entail revisions to all of the permit conditions listed in ***Attachment 2***. Accordingly, the permit conditions listed in ***Attachment 2*** are not severable from contested permit condition I.A.6 and "***shall be stayed*** together with the contested condition[]."[24]

Where Evoqua unequivocally challenged EPA's assignment of joint responsibility for virtually all permit obligations, and the method of determining which party would be primarily responsible for implementing the many hundreds of permit requirements is not specified in the permit, EPA's determination that all co-permittee provisions in the permit are not affected, not severable, and not stayed is clearly erroneous. As Evoqua effectively challenged the co-permittee language throughout the permit, EPA has a non-discretionary duty to stay all provisions that require the "Permittees" to act, or that otherwise impose requirements or compliance obligations on Evoqua and CRIT jointly as "Permittees." Failure to do so is clear error. While Evoqua

[24] 40 C.F.R. § 124.16(a)(2)(i) (emphasis added).

maintains that the applicable regulations strip EPA of any discretion in this regard, to the extent that EPA had any discretion to exercise in identifying the stayed permit provisions, EPA's exercise of that limited discretion was arbitrary and capricious, without support in the record, and should be reviewed and remanded.

## IV.
## PRAYER

For the foregoing reasons, Evoqua respectfully requests that the EAB remand the Notification to EPA with instructions to stay the permit conditions listed in ***Attachment 2*** 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 the Notification "become fully effective and enforceable 30 days after the date of the [N]otification,"[25] Evoqua respectfully requests that the EAB decide this motion and enter the requested order on an expedited basis.

## V.
## STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Undersigned counsel for Evoqua hereby certifies that this motion complies with the word limit of 40 C.F.R. § 124.19(f)(5) because this motion contains 2,595 words.

## VI.
## CERTIFICATE OF CONFERENCE

Undersigned counsel for Evoqua hereby certifies that, in accordance with 40 C.F.R. § 124.19(f)(2), counsel for Evoqua conferred with counsel for EPA Region IX to ascertain whether EPA concurs or objects to the motion. Counsel for EPA Region IX advised counsel for Evoqua that EPA objects to the motion.

[25] 40 C.F.R. § 124.16(a)(2)(i).

## VII.
## LIST OF ATTACHMENTS

***Attachment 1***: United States Environmental Protection Agency, Region IX, NOTIFICATION Regarding Effect of Petition for Review on [E]ffective [D]ate of Final RCRA Permit for Evoqua Water Technologies, LLC and the Colorado River Indian Tribes, Parker, AZ, EPA ID No.: AZD982441263 (Nov. 1, 2018)

***Attachment 2***: List of Non-Severable Permit Conditions that Must be Stayed

Date: November 14, 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 motion has been served on the following parties via the following method on this 14th day of November 2018:

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